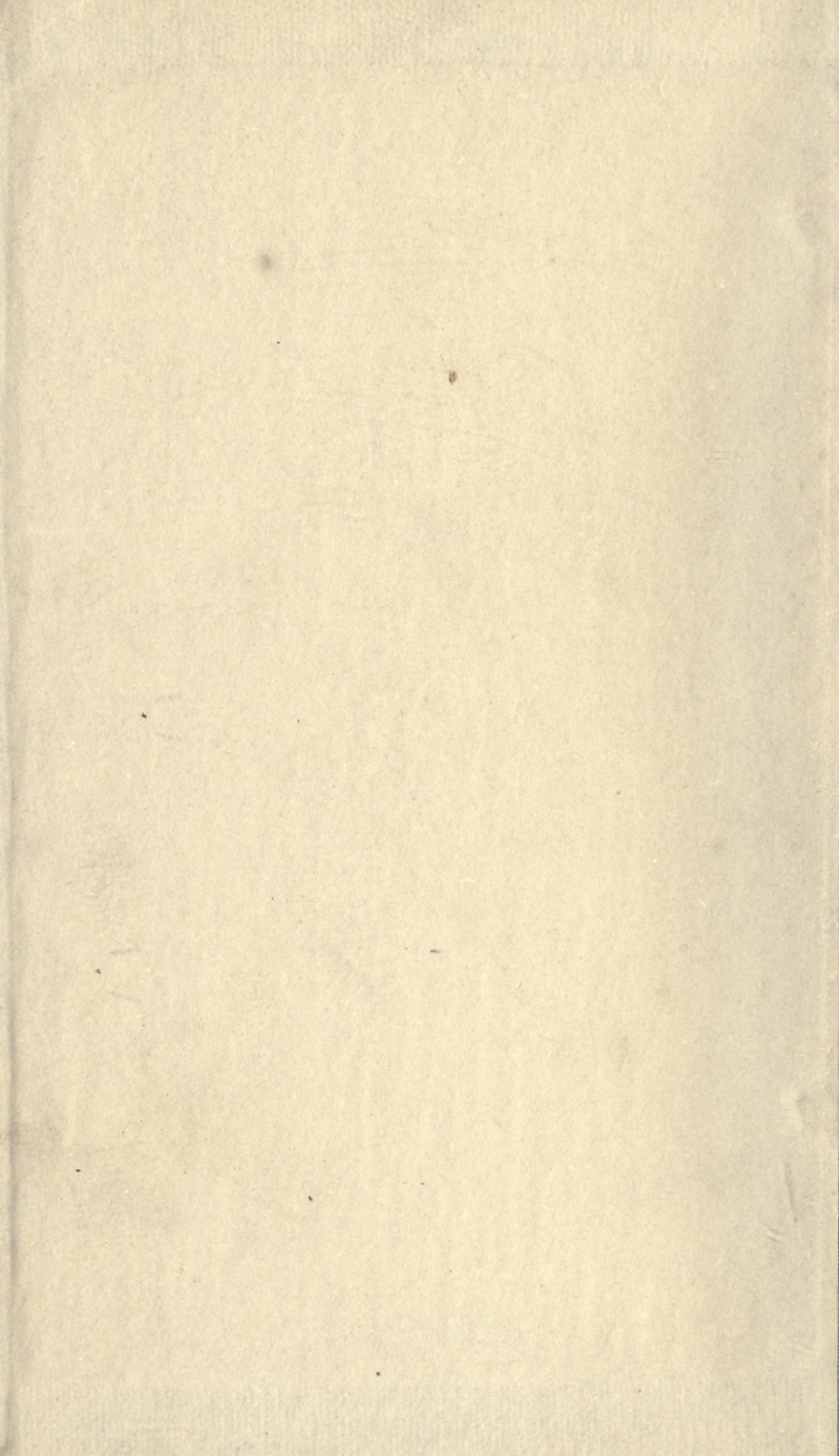




3 1761 08164420 5



HARVARD
|||
LAW REVIEW

VOL. XXVI.

1912-1913

CAMBRIDGE, MASS.
THE HARVARD LAW REVIEW ASSOCIATION

1913



Copyright, 1912, 1913,
BY THE HARVARD LAW REVIEW ASSOCIATION

668002
18. 11. 57

K

A1H3395

V. 26



THE UNIVERSITY PRESS, CAMBRIDGE, U.S.A.

TABLE OF CONTENTS.

ARTICLES.

	PAGE
ADMINISTRATION OF JUSTICE IN THE MODERN CITY, THE. <i>Roscoe Pound</i> . . .	283
CONSIDERATION, THE DOCTRINE OF. <i>Clarence D. Ashley</i>	429
CONSTITUTION AND THE COURTS, THE. <i>John G. Palfrey</i>	507
DEEDS OF LAND, CONDITIONAL DELIVERIES OF. <i>Harry A. Bigelow</i>	565
ELECTION OF REMEDIES. <i>Charles P. Hine</i>	707
FOURTEENTH AMENDMENT, JUDICIAL CONSTRUCTION OF. <i>Francis J. Swayze</i> .	I
GENERAL POWERS AND THE RULE AGAINST PERPETUITIES. <i>Albert M. Kales</i> .	64
GENERAL TESTAMENTARY POWERS AND THE RULE AGAINST PERPETUITIES. <i>John C. Gray</i>	720
HEARSAY RULE, AN EXCEPTION TO THE. <i>Eustace Seligman</i>	146
IMPEACHMENT OF THE FEDERAL JUDICIARY, THE. <i>Wrisley Brown</i>	684
INCORPORATION LAWS, THE POWER OF CONGRESS TO ENACT. <i>Victor Morawetz</i>	667
INTERLOCKING DIRECTORATES, THE PROBLEM AND ITS SOLUTION. <i>Max Pam</i>	467
INTERNATIONAL ARBITRATION OF JUSTICIABLE DISPUTES. <i>William W. Thayer</i>	416
JURISDICTION OF COURTS OVER FOREIGNERS. <i>Joseph Henry Beale</i>	193, 283
NEGOTIABLE INSTRUMENTS LAW, SOME NECESSARY AMENDMENTS OF. <i>J. D.</i> <i>Brannan</i>	493, 588
NEGRO DISFRANCHISEMENT, THE LATEST PHASE OF. <i>Julien C. Monnet</i> . . .	42
NOTICE TO A CORPORATION FROM ENTRIES ON ITS BOOKS. <i>Edwin H. Abbot, Jr.</i> .	237
PROPOSED PATENT LAW REVISION, THE. <i>Gilbert H. Montague</i>	128
REFORMED EQUITY PROCEDURE IN ENGLAND, THE OPERATION OF	99
ROMAN LAW, THE VOCATION OF AMERICA FOR THE SCIENCE OF. <i>Rudolf Leonhard</i>	389
SHARES WITHOUT NOMINAL OR PAR VALUE. <i>Victor Morawetz</i>	729
STATUTE OF FRAUDS, THE DATE AND AUTHORSHIP OF. <i>George P. Costigan, Jr.</i>	329
STATUTE OF USES, THE POLITICAL CAUSES WHICH SHAPED. <i>W. S. Holdsworth</i> .	108
STRIKING WORDS OUT OF A WILL. <i>Roland Gray</i>	212
TRIAL BY JURY IN UNITED STATES COURTS. <i>J. L. Thorndike</i>	732
WATER POWERS, THE CONSERVATION OF. <i>Rome G. Brown</i>	601

INDEX-DIGEST.

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

A

ADMIRALTY.

See also *Maritime Liens*.

Torts: Damages recoverable by one of two vessels at fault from the other: full damages. 264
Recognition of state law as to liability of county. 751

ADOPTION.

See *Descent and Distribution*.

ADVERSE POSSESSION.

Subject matter and extent of adverse possession: Dedication by adverse possession. 85
Minerals: acts necessary to constitute adverse possession. 555
What constitutes: Possession under unrecorded deed. 762

AGENCY.

Particular classes of agents: see *Corporations, Insurance, Municipal Corporations*.

Nature and incidents of relation:

Knowledge of agent: when imputed to a corporation. 237-252
When imputable to principal. 547
Knowledge of corporation: whether imputed to agent. 652

Principal's liability to third persons in torts: Fraud: liability

for fraud of agent committed for benefit of agent. 449
Slander by agent. 175

Principal's liability for acts of independent contractor: Landowner's liability for negligent blasting. 650

Agent's liability to third parties:

Nonfeasance of agent as basis of liability. 174
Parties to writings: parol evidence to exonerate agent. 650
Personal liability of agent of corporation for *ultra vires* transaction. 542, 550

Ratification of unauthorized contracts: Contract of insurance ratified after occurrence of loss. 264

ASSAULT.

Civil liability: Physician's liability for operation without patient's consent. 91

ASSIGNMENTS.

Of right of entry, see *Deeds*.

ASSUMPSIT.

Action based on waiver of tort, see under *Quasi-Contracts*.

B

BAILMENT.

See *Carriers; Trover and Conversion*.

Nature of bailments: Liability of restaurant keeper for guests' overcoats. 751

Bailor and bailee: Limitation of liability becoming a term of contract. 651

BANKRUPTCY.

Bankruptcy Act of 1898 and Amendments:

§ 47 a (2) 1910. 82
§ 63 (a) 4. 264

§ 67 f. 752
§ 70 a. 364

Discharge: Assignment of expectancy not affected by discharge. 174
Debts not affected: alimony. 752

Liens, dissolution of: Liens obtained within four months valid except as against trustee, and merely voidable as to him. 752

Preference: Insurance from property preferentially mortgaged, as a preference. 362, 365

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Property passing to trustee: Perishable goods: purchaser after adjudication protected.	364	\$ 186.	591, 599-600
Property conveyed under deeds which are void as to creditors cannot be recovered by trustee.	82	187.	365
Provable claims: Claim against bankrupt indorser of note maturing after filing of petition: effect of partial payment at maturity by maker.	264	188.	365
Dividends informally declared.	370	192.	366
Executory contracts for sale of goods to be performed after the adjudication.	72, 92	Formal requisites: Certainty in amount: "currency" and "current funds."	493-494
BANKS AND BANKING.		Indorsement: Right of subsequent holder to restrain negotiability of instrument indorsed in blank by payee.	500-501
Deposits: Clearing house: effect of payment through.	265	Anomalous indorser: Liability at common law, and under Negotiable Instruments Law.	588-589
Joint creditors: right of survivor.	547	Overdue paper: Transfer after maturity: liability of accommodation party.	494-500
BILLS AND NOTES.		Purchasers for value without notice: Application to doctrine of <i>Price v. Neal</i> .	634, 651
See <i>Judgments; Pledges.</i>		Corporation's knowledge as notice to officers.	652
Negotiable instruments law:		Payee as purchaser for value.	652
6.	493-494	Doctrine of Price v. Neal: Relation to the doctrine of purchaser for value without notice.	634, 651
20.	494-500	Payment and discharge: Suit against maker by indorsee who has recovered in full from indorser but who retained the paper.	449
30.	652	Checks: Certified checks: maker not discharged when certified at his instance.	365
40.	500-502	— maker discharged when certified at instance of holder.	365
30.	502	Failure to present check excusing drawer.	599-600
52.	652	Statutes: Negotiable Instruments Law: effect on set-off of accommodated payee of promissory note against insolvent bank.	366
53.	590	— necessary amendments.	493-506; 588-600
58.	502-506		
64.	588-589		
70.	589-590		
71.	590-591		
85.	592		
119.	593-596		
120.	594-596		
119.	366		
120.	366		
121.	504-505		
137.	596-599		
185.	591		

C

CANCELLATION.

Insurance policy: Cancellation for breach of warranty. 366

CARRIERS.

See also *Interstate Commerce Railroads; Sales.*

Control and regulation: Withdrawal from public service. 659

Federal regulation: Validity of pro-

vision that pipe lines be common carriers. 631, 655

State regulation: Constitutionality of statute providing reduced rates for militia. 360, 367

Constitutionality of statute requiring policemen to be carried free on trolley cars. 360, 367

Custody and control of goods: When a carrier becomes a warehouseman. 367

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Connecting lines: Connecting carrier: presumption as to lost goods. 653
 — rights and duties of connecting carrier in regard to original consignor. 653
 Initial carrier: what constitutes assumption of liability for delivery of goods at destination. 653

Discrimination and overcharge: Discrimination resulting in financial benefit to state: whether justified. 360, 367
 Extension of credit to some but not all shippers constitutes discrimination. 82

Limitation on liability: Agreed valuation: effect of deviation on contract for. 752

Effect of Carmack amendment on state's power over contracts limiting liability. 456

Negligence: when contract of exemption for, is valid. 742, 762

Loss or injury to goods: Effect of deviation in contract for agreed valuation. 752

CHECKS.

See under *Bills and Notes*.

CIVIL LAW.

See *Roman Law*.

Personal rights of indefinite character: artist's rights in picture. 654

CONFLICT OF LAWS.

See *Domicile; Taxation*.

Extent of governmental powers: Extraterritorial effect of personal statutes. 536, 548

Recognition of foreign judgments: Merger of foreign judgment. 375
 Reversal of judgment as defense to a foreign judgment based on the reversed judgment. 437, 450

Recognition of foreign penal laws: Enforcement of individual liability of directors. 172, 175
 Penal statutes: what laws are to be regarded as such. 172, 175

Jurisdiction of courts: personal jurisdiction: Allowing foreigners to sue. 288

Enjoining person within territory from prosecuting a pending suit in a foreign jurisdiction. 347, 374

Jurisdiction of court of equity. 292-296

Jurisdiction over foreigners: at common law. 283-301

Jurisdiction over foreigners; common law of Europe. 195-206

— right of foreigner to sue. 196-197

— suit against a foreigner. 197-206

— foreign corporations. 206

— European law. 193-211

— law of France. 207-211

— right of foreigner to sue. 207-209

— suit against a foreigner. 209-211

— Roman law. 195

Jurisdiction over persons not actually present: in general. 296-301

— by consent. 297-301

— if property within jurisdiction. 297

— if cause of action arose within territory. 296-297

— domicile. 296

Presence within jurisdiction. 284-296

Proceeding on a foreign cause of action. 289-292

Service on foreign corporation which has ceased to do business in the state. 749, 756

Jurisdiction for divorce: Decree at matrimonial domicile entitled to full faith and credit. 449

Separate domicile of wife. 447, 450

Remedies: right of action: Proceeding in one state on cause of action arising in another. 289-292

Marriage: Capacity of parties determined by law of place of celebration. 536, 548

Foreign marriage in spite of divorce forbidding re-marriage. 536, 548

Nullification: what court can decree. 253, 265

Rights in property: Law of forum governing maritime lien acquired in foreign port. 356, 377

Effect and performance of contracts: Foreign contract that looks only to insurance fund for compensation for injury caused by negligence of master: available as defense to tort in jurisdiction. 459

Assignment of Contracts: Indorsement of instrument, non-negotiable at place of contracting, at a place where such instruments are negotiable. 753

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

CONSIDERATION.

Theories of consideration: Nature of consideration: in general. 429-436

Whether it must be presently exchanged or may be given subsequently. 429-432

Whether the consideration in a bilateral contract is the counter promise or performance of such promise. 433-435

CONSPIRACY.

Criminal liability: Trial allowed where overt act committed. 83

CONSTITUTIONAL LAW.

See also *Contempt*; *Criminal Law* (Former Jeopardy); *Elections*; *Eminent Domain*; *Federal Courts*; *Impeachment*; *Interstate Commerce*; *Police Power*; *Taxation*.

Construction, operation, and enforcement of constitutions: see also under sub-head *Due Process of Law*.

Fourteenth Amendment: judicial construction of, in general. 1-41

— definition of "liberty." 9-13

— definition of "property." 13-18

— "person" construed to include corporation. 9

— what is "action by states." 2-6

— what is "equal protection of the laws." 29-41

Separation of powers: Doctrine in American form of government: in general. 744, 753

Administrative appointment of judicial officers. 744, 753

Powers of the judiciary: Advisory opinions: obligation of courts to give same. 655

The Constitution and the courts. 507-530

Powers of legislature: Power to regulate punishment for contempt of court created by Constitution. 265

Validity of statute effective on passage of constitutional amendment. 549

Delegation of Powers: Taxing power: delegation of to directors of school district appointed by the courts held valid. 257, 266

Implied Powers: Power of Congress to enact incorporation laws and to regulate corporations. 667-683

Impairment of the obligation of contracts: Remedy: change of, incorporated in the obligation. 368

Right of purchaser at mortgage foreclosure sale to raise the question. 548

Trial by jury: Validity of statute allowing change of venue on application of prosecutor. 754

Where trial court wrongly did not direct verdict for defendant, the appellate court has power only to direct a new trial, under Seventh Amendment. 732-737, 738, 754

Due process of law: Judicial definition of, in general. 18-29

Deprivation of property where financial benefit to state. 360

Limiting the use to which property may be put. 367

Pipe-line Amendment to Interstate Commerce Act. 631, 655

Personal rights: Martial law: doctrine of public necessity. 636, 655

Enforcement of judgments: Divorce decrees. 449

Personal rights: civil, political, and religious: Basis of military jurisdiction. 636, 655

Cruel and unusual punishment. 163, 175

"Liberty," "property," and "equal protection of the laws" as used in the Fourteenth Amendment, definition of. 9-18, 29-41

Liberty to contract: employer's right to require employee not to remain in trade union. 83

Liberty to contract: prohibition of discrimination between different communities to injure competition. 369

Power of court to review action of military authority. 636, 655

Religious liberty: compulsory fee to support Christian association in state college. 459

Right to vote: right of negroes to suffrage: in general. 42-63

— right of negroes to suffrage: grandfather clauses. 43-59

— right of negroes to suffrage: remedy if "grandfather clauses" unconstitutional. 59-63

Self-incrimination: compulsory statements out of court. 93

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Privileges, immunities, and class legislation: Regulation of trades: prohibiting discrimination between different communities to injure competitors. 369

CONTEMPT.

Punishment for contempt: Legislature: power to regulate punishment for contempt of a court created by constitution. 265

CONTRACTS.

See also *Bailments; Consideration; Constitutional Law; Damages; Illegal Contracts; Offer and Acceptance; Quasi-Contracts.*

Defenses: Effect of receivership of corporation on its executory contracts. 72, 92

Remedies for breach of contract: Successive actions by correspondence school for installments as they came due after repudiation by pupil. 83

CONTRIBUTORY NEGLIGENCE.

In general: Duty to look before crossing street. 93

"Last clear chance" doctrine. 369

CORPORATIONS.

See also *Municipal Corporation; Public Service Companies; Taxation.*

Nature of corporation: Notice: whether corporation can have notice. 237-239

Citizenship and domicile of corporation: Conclusiveness of statement of location in charter. 266

Charters: Constructive notice of charter in *ultra vires* transactions. 540, 550

Capital, stock, and dividends: Apportionment of stock dividends between life tenant and remainderman. 77, 89

Dividends: preferred stockholder's right to share in stock dividends. 75, 84, 656

Dividends: right of stockholder to recover dividends informally declared. 370

Shares without nominal or par value. 729-731

Situs of stock at domicile of corporation. 754

Corporate powers and their exercise: Materiality of notice to corporation when officer acting in its behalf has no personal knowledge of the matter in question. 246-252

Notice: how a corporation can receive notice. 239-246

Ultra vires contracts: rights and liabilities of parties: Constructive notice of charter. 540, 550

Personal liability of agent. 542, 550

Directors and other officers: Agent: personal liability for *ultra vires* transaction. 542, 550

Interlocking directorates: in general. 467-492

— common-law remedies. 471-480

— proposed statutory remedies. 480-488

— whether Sherman anti-trust law is applicable. 488-490

Liability of directors to corporation for torts committed in its name for their personal ends. 267

Liability of directors: Liability to stockholders for excessive salaries paid to themselves and other employees. 451

Private interest of director: effect on contracts of corporation. 472-477

Remedies against directors: accountability for profits from contracts of corporation in which they had a private interest. 477-479

Stockholders: rights incident to membership: Minority stockholders: right to restrain transfer of control of stock from one competitor to another. 549

Right of preemption of preferred stockholder. 75, 84, 656

Stockholders: individual liability to corporation and creditors: Full payment of shares: liability of innocent purchaser of unpaid stock. 540, 550

Torts and crimes: Tort action against corporation: slander by agent. 175

COURTS.

See *Federal Courts; Impeachment; Jurisdiction of Courts*, see *Conflict of Laws*.

Administration of justice in the modern city. 302-328

The Constitution and the courts. 507-530

Advisory opinions: obligation of courts to give same. 655

Difficulties involved in meeting present day problems of administration of justice in the American city. 324-328

Problems of the administration of

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

justice in an American city to-day.	310-324	CRIMINAL LAW.
A proposed method of dealing with "social legislation."	525-530	Particular crimes, see <i>Conspiracy</i> ; <i>False Pretenses</i> ; <i>Larceny</i> .
The so-called "recall of judicial decisions"; in general.	508-525	Attempt: Jurisdiction. 452
Unsuitability of present judicial organization to modern needs.	302-328	Statutory offenses: Divisibility of offense: practice of medicine without license. 370
		Liability of agent of purchaser in illegal liquor sale. 550
COVENANTS OF TITLE.		Specific intent: Assault with intent to kill. 452
Covenant against incumbrances:		Former jeopardy: Severer punishment for habitual criminals. 84
Former recovery not a bar to subsequent one.	176	Jurisdiction: Trial of conspiracy allowed where overt act committed. 83
Covenant of warranty: measure of warrantor's liability: to sub-grantee.	755	

D

DAMAGES.

In admiralty, see *Admiralty*; see also *Death by Wrongful Act*; *Eminent Domain*.

Measure of damages: Covenant of warranty: limited to amount paid by original grantee. 755

Infringement of easement, whether recovery for injury to other than dominant tenement. 90

Probate clause in insurance policy: apportionment of recovery when both compound and specific policies. 80, 88

Exemplary damages: Evidence of defendant's wealth. 270

Mitigation: Right of converter to return goods. 764

DEATH BY WRONGFUL ACT.

Damages in statutory action: Nature of damages recoverable: loss of care and advice of husband. 551

DEDICATION.

See also *Eminent Domain*.

Essential elements of dedication: Acceptance by adverse possession. 85

DEEDS.

See also *Parol Evidence Rule*.

Delivery, acknowledgment, and acceptance: Delivery in escrow: in general. 565-587
— to third person to be delivered on performance of contractual obligation by grantee. 567-575

— to third person to be delivered on grantor's death. 575-582

— to third person to be delivered on happening of contingency. 582-587

Attestation: Statute requiring attestation: whether attestation of acknowledgment is sufficient. 267

Construction and operation in general: Warranty deed of timber: whether fee passes. 453

Conditions: Assignment of right of entry to co-heir. 176

DESCENT AND DISTRIBUTION..

See also *Executors and Administrators*.
Right of father to inherit from son adopted by another. 546

DIRECTORS.

See *Corporations*.

DIVORCE.

See *Conflict of Laws*; *Domicile*. Judgments as being entitled to full faith and credit, see *Constitutional Law (Enforcement of Judgments)*.

In general: Distinguished from nullification. 253, 265

Alimony: Modification of decree which adopted terms of agreement between parties. 441, 453
Power to modify award in gross. 551

DOMICILE.

See also *Conflict of Laws*.

Domicile of corporations: conclusiveness of statement of location in charter. 266

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Domicile of persons *non sui juris*:
 capacity to change. 268
 Husband and wife: possibility of
 separate domicile. 447, 450

DURESS.

See also *Quasi-contracts*.

The nature and effect of duress. 265, 268

E

EASEMENTS.

Nature and classes of easement:
 Right to maintain a nuisance. 460

EJECTMENT.

Railroad building on land: effect of
 knowledge of owner. 184

ELECTION.

See *Equitable Election*.

ELECTION OF REMEDIES.

A criticism of the doctrine. 707-719
 Origin of the doctrine. 715-719
 The conflict in decisions applying the
 rule. 711-715
 Inconsistency of the doctrine with
 other rules of law. 711
 The inequitable operation of the rule.
 709-711
 The principles on which the doctrine
 depends. 708-709

ELECTIONS.

Eligibility of judge for nomination to
 office beginning after his term. 269
 Right to appear on ballot under party
 name: in general. 351, 371
 — whether political or judicial ques-
 tion. 351, 371
 Right to appear on ballot under party
 name: when nomination made by
 primary. 351, 371

EMINENT DOMAIN.

What property may be taken: City
 taking property of which it was
 the grantor. 177
 Property already dedicated to pub-
 lic use. 177
Compensation: Effect of change of
 user. 439, 453
 Rights given against the fund. 453
 Mortgagee's claim on fund paid into
 court. 453

EQUITABLE CHARGES.

See under *Trusts*.

EQUITABLE CONVERSION.

Effect of option to purchase land.
 747, 763

EQUITABLE ELECTION.

Taking under will in one state bars
 claiming against it in another. 177

EQUITY.

See also *Foreign Corporations*; *Injunc-
 tion*; *Specific Performance*.

Jurisdiction: In general. 292-296

Action by municipality against tax
 collector for taxes collected. 552

Injunction by municipal corpora-
 tion against public nuisance. 371

Injunction to restrain suit in foreign
 jurisdiction. 347, 374

Penal ordinance: whether can en-
 join enforcement. 454

Power to decree positive acts abroad.
 292-296

Substantial performance of con-
 ditions precedent in insurance
 policy. 271

Procedure: Operation of the re-
 formed equity procedure in Eng-
 land. 99-107

ESTOPPEL.

Estoppel in pais: Failure to act.

349, 372

EVIDENCE.

See also *Admissions*; *Constitutional
 Law*; *Damages*; *Parol Evidence
 Rule*; *Presumption*; *Witnesses*.

**General principles and rules of
 exclusion:** Exemplary damages:
 evidence of defendant's wealth. 270

Hearsay: in general: General discus-
 sion of rule. 146-153

What facts can be excluded by the
 hearsay rule. 148-149

What is a hearsay use of a state-
 ment. 149-153

Dying Declarations: Personal knowl-
 edge by deceased of facts stated. 85

**Declarations concerning matters
 of public or general interest:**
 Private boundaries: admissibility
 of declarations of deceased former
 owner as proof. 372

Private boundaries: requirement
 that declarant must have duty
 or interest to obtain accurate
 information. 372

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Declarations against interest:
Whether confession of crime is sufficient. 755

Declarations in course of duty:
Entries made by person other than original observer. 85

Declarations concerning intention, feelings, or bodily conditions:
Intention: declarations as exception to the hearsay rule: general discussion. 146-160

Res gestæ: Violation of rules of railway company as evidence of negligence. 552

Opinion evidence: expert testimony: learned treatises. 642, 656
Handwriting: comparison of handwriting in general. 167, 178

Non-expert testimony: comparison of lost disputed writings with genuine writings in court. 167, 178

Similar facts and occurrences:
Crimes other than one in issue. 656

Real evidence: Physical examination of plaintiff in personal injury suit. 269

Documents: Ancient documents as evidence of facts stated therein. 544, 552
Ancient document as self-proving. 544, 552

EXECUTORS AND ADMINISTRATORS.

Administration: Appointment of debtor as executor as completing an intended release of debt. 445, 455

Appointment of intended donee as executor as completing gift. 445

Title: Estate by implication in realty. 382

Rights, powers, and duties: Statute of limitations: right of executor to plead to his personal debt to the estate. 269

EXEMPLARY DAMAGES.

See under *Damages*.

F

FALSE PRETENSES.

Distinction between false pretenses and larceny by trick. 375

FEDERAL COURTS.

See also *Impeachment*.

Jurisdiction: Enjoining proceedings in state courts. 270

Jurisdiction based on nature of subject matter: Laches as a federal question. 86

Relation of state and federal courts: Enjoining action in state court. 270

FEDERAL EMPLOYERS' LIABILITY ACTS.

See under *Interstate Commerce (Control by Congress)*.

FENCES.

Fencing statutes: civil liability of railroad, under, for lost cattle. 531, 559

FIXTURES.

Agreement to treat fixtures as personalty: effect as to *bonâ fide* purchaser of land. 657

Trade fixtures. 372

What fixtures are removable. 372

FOREIGN CORPORATIONS.

See under *Conflict of Laws; Corporations, Taxation*.

Internal management: jurisdiction of equity to interfere. 451

Mandamus to compel inspection of books. 451

Service of process: when corporation has ceased to do business in the state. 749, 756

FRAUD.

See *Agency*.

FRAUDULENT CONVEYANCES.

See also *Bankruptcy*.

Rights of parties to the conveyance: Insurance as a fraudulent conveyance. 362

G

GARNISHMENT.

Persons subject to garnishment:
Insurance company: distinction

between indemnity insurance and insurance against liability. 373
Insurance policy: distinction be-

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

tween indemnity insurance and insurance against liability. 373	Effect of appointment of donee of incompleated gift by executor. 445
GIFTS.	Gifts causa mortis: Valid as against husband's rights under distribution statute. 86
Gifts inter vivos: Delivery of bill of sale sufficient. 87	

H

HANDWRITING.

See under *Evidence* (*Opinion Evidence*).

HEARSAY EVIDENCE.

See under *Evidence*.

HIGHWAYS.

See also *Dedication*.

Establishment: Pecuniary interest of commissioner renders resolution for establishment voidable. 87

HISTORY OF LAW.

See also *Courts; Judges*.

Property: Causes which shaped the Statute of Uses. 108-127

Miscellaneous: Date and authorship of the Statute of Frauds. 329-346
History of judicial organization in America. 302-310
Origin of doctrine of election of remedies. 715-719

HUSBAND AND WIFE.

See also *Conflict of Laws; Domicile;*

Marriage; Witnesses (*Competency as to particular Matters*).

Rights of husband against wife and in her property: Gift *causa mortis* valid as against husband's rights under distribution statute. 86

Rights and liabilities of husband as to third parties: Action for physical illness of wife caused by publication of libelous words. 87

Rights and liabilities of wife as to third parties: Action by wife for loss of companionship caused by negligent injury to husband. 74, 88

Recovery by wife for loss of companionship caused by selling opium to husband. 74, 88

Contracts between husband and wife: Separation agreements: effect of adultery of wife upon her rights under separation agreements. 553

I

ILLEGAL CONTRACTS.

Ultra vires contracts, see *Corporations*.

Contracts collaterally related to something illegal: Recovery of proceeds of illegal transaction in hands of agent. 374

Contracts against public policy: Detective bureau's compensation depending upon success. 553
Exempting railway for loss by fire due to railroad's negligence. 742, 762

Exemptions from liability for negligence: in general. 742, 762

Ousting courts of jurisdiction: agreement to submit to tribunals of mutual benefit society. 178

Effect of illegality: Recovery by parties to illegal contracts: in general. 738, 756

Recovery of proceeds in hands of agent. 374

Scope of maxim "*in pari delicto melior est conditio possidentis*." 738, 756

IMPEACHMENT.

A monograph on the impeachment of the federal judiciary. 684-706
American cases. 699-705

The *lex parlamentaria* of England. 685-687

Provisions of the federal Constitution. 687-699

INFANTS.

Contracts and conveyances. Necessary, liability on executory contract for. 455

Actions for injuries to infants: Employing child under the age allowed by child-labor statute:

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

liability for personal injuries if child obtained employment by misrepresentation of age. 646, 660

Unborn children: Rights of unborn children in law of torts. 638, 657

INHERITANCE TAX.

See *Taxation* (*Particular forms of taxation*).

INJUNCTIONS.

Nature and scope of remedy: Municipal corporation: right to injunction to restrain public nuisance. 371

Acts restrained: Infringement of patent by public officers. 88

Interference with abutter's right of free access. 179

Restraining suits in a foreign jurisdiction. 347, 374

Submission to popular vote of constitutional amendment which lacked required number of votes in legislature. 455

Sherman Anti-Trust Act: right of private party to sue. 179

INSANE PERSONS.

See *Domicile*.

INSURANCE.

See also *Garnishment*.

Nature and incidents of insurance contracts: Ratification of unauthorized insurance contract by insured after loss. 264

Insurable interest: Persons having insurable interest: sister in life of brother. 756

Rights of beneficiary: Change of beneficiaries: when change is considered complete. 271

Amount of recovery: Pro rata clause: operation when both compound and specific policies. 80, 88

Mutual benefit Insurance: Right to amend by-laws to detriment of member. 180

Validity of agreement to submit to tribunals of society. 178

INTERNATIONAL LAW.

In general: Arbitration of justiciable disputes. 416-428

"Justiciable": theoretical and practical justification for use of word in arbitration treaties. 416-428

Treaties: Arbitration of justiciable disputes. 416-428

INTERSTATE COMMERCE.

See also *Railroads; Restraint of Trade; Taxation*.

What constitutes interstate commerce: Effect of intent of person to whom goods are shipped. 554
Termini within one state of route partly within another. 457

Control by Congress: Conflict between federal and state police regulations: safety appliance acts. 757

Effect of Carmack amendment on contracts limiting liability of carriers. 456

Employer's liability for death under federal act; state statute as governing distribution of damages recovered. 374

Federal Employer's Liability Acts: Act of 1908; employees protected by act. 354, 374

National control and regulation of state corporations. 679-683

Power to confer on corporations special rights or franchises. 673-675

Power to enact incorporation laws. 667-671

Power to incorporate trading companies. 671-673

Requirement that interstate pipe lines be common carriers held unconstitutional. 631, 655

Webb Act allowing prevention of shipment of liquor into prohibited territory. 533, 554

White Slave Act. 657

Wilson Act: applicability to foreign shipments of liquor. 533, 554

Control by states: Conflict between federal and state police regulations: pure food laws. 757

— safety appliance acts. 757

Convict-made goods: statute requiring that they be labelled unconstitutional. 78, 88

Power to legislate concerning national corporations. 677

Railroad regulation: effect of Carmack amendment on contracts limiting liability of carrier. 456

Reservation by state of right to fix interstate rates as condition of incorporation or lease. 539, 554

Separate accommodations for races in interstate trains. 456

Taxation: in general. 358, 375

— goods in transit. 358, 375, 658

— national corporations. 678-679

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Interstate commerce commission:

Power to order equalization of intrastate rates with interstate rates. 757

INTOXICATING LIQUORS.

Legislation: Webb Act allowing prevention of shipment of liquor into prohibited territory. 533, 554
Wilson Act: applicability to foreign commerce. 533, 554

J

JOINT TENANCY.

See *Banks and Banking (Deposits)*.

JOINT WRONGDOERS.

Release of one reserving rights against others. 185
Release of one not liable for the tort. 658

JUDGES.

See also *Courts; Impeachment*.

The county judge and the administration of justice in the American city. 325-327

Eligibility during term for nomination to office beginning after his term. 269

Impeachment of the federal judiciary: history, scope, and decisions. 684-706

JUDGMENT.

See also *Res Judicata*.

Collateral attack: merger of foreign judgments. 375

Foreign judgments: Constitutional protection of divorce decrees. 449
Merger of foreign judgment. 375
Reversal of judgment as defense to judgment based on the reversed judgment. 437, 450

Satisfaction: Assignment to maker of note of judgment against indorser. 458

JURISDICTION.

See *Conflict of Laws; Equity; Federal Courts*.

JURISPRUDENCE.

See *Roman Law*.

JURY.

Waiver of trial by jury: consent to trial by five jurors. 271

L

LANDLORD AND TENANT.

See also *Mechanics' Liens*.

Tenancies from year to year and month to month: Notice necessary to terminate monthly tenancy. 181

Assignment and subletting: Sublessee's rights after surrender by lessor. 458

Sublease for full term with right of re-entry reserved: whether an assignment of term. 459

Rent: Constructive eviction defense to action for rent. 758

Right to recover from sublessee after surrender by lessee. 458

LARCENY.

Possession and larceny. Possession of abandoned chattels. 272

Larceny by trick: Distinction between larceny by trick and false pretenses. 375

LEGACIES AND DEVISES.

See also *Executors and Administrators*.

Lapsed bequests and devises: Provision against lapsing of a legacy by a power of appointment in the legatee invalid. 91

Abatement: Legacy conditioned on relinquishment of claims against third parties. 758

LIBEL AND SLANDER.

See *Agency; Corporations*.

Acts and words actionable: Attributing an account of improbable personal experiences to a well-known author: whether libelous *per se*. 759

Failure to pay debt, words charging, not actionable. 181

Liability of corporation for slander. 175

Shadowing actionable without special damages. 658

Privileged communications: Publication of official opinion of Attorney General. 89

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

LICENSES.

Revocation: Revocation after licensee has acted on parol license and incurred expense. 376

LIENS.

Maritime Liens, see *Maritime Liens*.

LIFE ESTATES.

Power of life tenants to find remaindermen by voluntary partition. 275

Trust funds: apportionment of stock

dividends between life tenant and remainderman. 77, 89

LIMITATION OF ACTIONS.

Operation and effect of bar by limitation: Executor's right to set up to his personal debt to the estate. 269

Reviving of mortgage by grantee without reviving debt. 89

Waiver of statute: Words necessary. 182

M**MANDAMUS.**

Persons subject to mandamus: Mandamus of directors of foreign corporation by fellow director, to produce books. 451

Parties: Right of *de facto* officer to compel payment of salary. 555

MARITIME LIENS.

Claims giving rise to liens: Materialman's lien. 356

Enforcement of liens: Materialman's lien: what law governs. 356, 377

MARRIAGE.

See also *Conflict of Laws*.

Validity: Foreign marriage after divorce prohibiting remarriage. 536, 548

Nullification: Distinguished from divorce. 253, 265
Jurisdiction for nullification. 253, 265

MASTER AND SERVANT.

See *Agency*.

Duty of master to provide safe appliances: Contract that employee look only to insurance fund. 459

Assumption of risk: Basis of doctrine. 262, 272

Criminal statute requiring safe appliances: effect of, on doctrine. 262, 272

Employers' Liability Acts: Federal Employers' Liability Act of 1908: employees within scope. 354, 374

Workmen's Compensation Acts: Recovery for injury against third party: right to subsequent recovery against employer. 377

Relief fund benefits: whether acceptance of, is bar to recovery under Federal Employers' Liability Act. 273

MECHANICS' LIENS.

Right to enforce against lessor lien acquired on contract with lessee. 377

MINES AND MINERALS.

Adverse possession where severance of surface. 555

MORTGAGES.

See also *Subrogation*.

Priorities: Equitable substitution: whether intending purchaser of first mortgage who takes new mortgage instead of assignment of old has priority over judgment creditor of mortgagor. 261, 273

Foreclosure: Rights of purchaser: right to question constitutionality of statute affecting redemption. 548

Limitation of actions: Reviving of mortgage by grantee without reviving debt. 89

MUNICIPAL CORPORATIONS.

See also *Dedication*.

Municipal debts and contracts: Liability for services performed under void contract. 273

Actions by and against municipal corporations: Injunction by city against public nuisance. 371

Franchises and licenses: Estoppel to challenge validity of ordinance while enjoying franchise under it. 759

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

N

NEGLIGENCE.

Contributory negligence, see *Contributory Negligence*.

Duty of care: Business custom is test of due care. 760

NEGOTIABLE INSTRUMENTS.

See under *Bills and Notes*.

NOTICE.

To agent as binding upon principal: see *Agency*.

To corporation from entries on its

books: see *Corporation (Corporate powers and their exercise)*.

NUISANCES.

What constitutes a nuisance: extinguishment of cause of action by parol license. 460

Recovery of damages: Action by one having no interest in the property affected. 760

Infringement of easement: recovery for injury to other than dominant tenement. 90

O

OFFER AND ACCEPTANCE.

Unilateral Contracts: Performance constituting acceptance. 274

OPINION EVIDENCE.

See under *Evidence*.

P

PARDON.

Effect on statute providing increased penalty for second conviction. 644, 659

PAROL EVIDENCE RULE.

Substantive law expressed in terms of evidence: Deed: parol agreement that it is to take effect on condition excluded. 182

Construction of documents: Wills: declarations of intention when legatee misdescribed. 90

PARTITION.

Power of life tenants to bind remaindermen by voluntary petition. 275

PATENTS.

The proposed patent law revision: general discussion. 128-145

PERCOLATING WATERS.

See *Waters and Watercourses*.

PERPETUITIES, RULE AGAINST.

See *Rule against Perpetuities*.

PHYSICIANS AND SURGEONS.

Necessity of patient's consent to operation. 91

PLEDGES.

Tortious disposal by pledgee: repledging by order of fraudulent pledgor. 660

Unindorsed promissory note held as collateral security: duty of pledgee to collect. 274

POLICE POWER.

See also *Intoxicating Liquors*.

Nature and extent: Present view of the United States Supreme Court. 631, 655

Statute requiring railroad to transport militia at less than regular rate: whether police power justifies this discrimination. 360, 367

Interest of public order: Separation of whites and negroes in railroad cars. 456

Interest of public safety: Regulation of railroad crossings. 169, 183

Interest of public taste: Building line without consent of all property owners. 367

Regulation of business and occupations: Labeling of convict-made goods by state statute: relation to interstate commerce. 78, 88

Prohibition against agreement not to join labor union as a condition of employment. 83

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

POLITICAL PARTIES.

See also *Elections*.

Validity of nominations: political or judicial question. 351, 371

Right to appear on ballot under party name. 351, 371

POSSESSION.

See under *Larceny; Title, Ownership and Possession*.

POWERS.

Attempt to exercise a power contained in will of living testator invalid. 91

General powers: application of rule against perpetuities. 64-70, 720-728

Time of gift: whether creation or exercise of the power. 64-70, 720-728

PRESUMPTIONS.

Existence and effect of presumptions in particular cases: Death after seven years: presumption of fact or law. 378

PRIORITIES.

See under *Mortgages*.

PRIVACY, RIGHT OF.

Nature and extent of right. 275

Public shadowing without special damage. 658

PROCEDURE.

See under *Equity*.

PROHIBITION.

Whether a writ of right. 378

PUBLIC OFFICERS.

See under *Injunctions*.

Compensation: *De facto* officers: right to salary. 555

PUBLIC SERVICE COMPANIES.

What callings are public: Cemeteries. 761

Regulation of public service companies: Contracts for division of territory: whether an illegal restraint of competition. 761

Water companies: regulation requiring increase of facilities beyond those required by charter. 183

Rights and duties: Discontinuing branch of railroad. 659

Duty to increase facilities. 183

PURCHASER FOR VALUE WITHOUT NOTICE.

See under *Bills and Notes*.

Q

QUASI-CONTRACTS.

Recovery for benefits conferred without contract: Subcontractor's right when original contractor's claim is unenforceable. 556

Waiver of tort: Effect of judgment

in passing title to chattel converted. 171, 183

Money paid under duress: Money paid under threat of criminal prosecution: recovery of same. 255, 268

R

RAILROADS.

See also *Carriers; Receivers*.

Title to land or right of way: Right of owner to oust railroad wrongfully in possession. 184

Railroad crossings: Ordinance requiring railroad to construct a viaduct suitable for use by a street railway: constitutionality. 169, 183

"Look and listen" rules: Direction of verdict for defendant in case of failure to look and listen proper. 93

Operation of leased lines: Liability of lessor for expenses of receivership of lessee. 165, 184

REAL PROPERTY.

See *History of Law; Partition; Tenancy in Common*.

RECEIVERS.

Effect of receivership of corporation on executory contracts. 72, 92

Executory contracts as provable claims. 72, 92

Liability for receivership expenses: of lessor railroad for expenses of receiver of lessee. 165, 184

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

Power to sue in a foreign jurisdiction.	91
RECORDING AND REGISTRY LAWS.	
Effect of recording in general: Adverse possession under unrecorded deed.	762
RES JUDICATA.	
Matters concluded: Covenant against incumbrances; former recovery not a bar to a subsequent one.	176
RESTRAINT OF TRADE.	
Monopoly: Price restrictions on re-sale of chattels.	640, 659
Public service companies: right of competing companies to divide territory.	761
Sherman Anti-Trust law: Amount of competitive business necessary to make combination illegal.	379
Combination of competing railroads through control of stock.	379
Contracts by carriers to purchase output of independent coal operators illegal.	380
Cornering of market.	461
Elimination of existing competition: whether illegal if there is potential competition.	380
Monopoly as a continuing offense.	762

Outside competitors: whether suppression of, necessary in railroad combination to be within the act.	379
Purchase by carriers of coal land from which a proposed new carrier expected to derive its revenue illegal.	379
Right of private party to sue for injunction for violation.	179
RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY.	
Personalty: restrictions in price on re-sale.	640, 659
RIGHT OF PRIVACY.	
See <i>Privacy, Right of.</i>	
ROMAN LAW.	
Character of the Roman influence on present European and American law.	402-405
General doctrines of Justinian's Institutes.	405-415
The influence of the national character of Roman law in Germany and America.	391-402
Vocation of America for the science of Roman law.	389-415
RULE AGAINST PERPETUITIES.	
Application to general powers.	64-70, 720-728
Powers: distinction between time and manner of exercise of special power.	648

S

SALES.

Rights and remedies of seller: Re-vesting of vendor's lien upon insolvency of buyer after sale to <i>bonâ fide</i> purchaser.	557
Implied warranties: Wholesomeness of provisions: canned goods eaten in dining car.	556

SEPARATION AGREEMENTS.

See *Husband and Wife (Contracts between husband and wife).*

SET-OFF AND COUNTER CLAIM.

Accommodated payee's right to set off against holder of note his credit balance.	366
--	-----

SLANDER.

See *Slander and Libel.*

SPECIFIC PERFORMANCE.

General nature and scope of equitable relief: Enforcement against intervening purchaser who took with notice of plaintiff's option.	747, 763
Right of joint vendee to conveyance to himself alone.	461

STATES.

Right to priority.	92
--------------------	----

STATUTE OF FRAUDS.

See also <i>Licenses.</i>	
Date and authorship.	329-346

Sufficient memorandum: Undelivered deed not reciting the parol contract.	276
--	-----

STATUTE OF LIMITATIONS.

See *Limitation of Actions.*

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

STATUTES.

See also *Constitutional Law*.

Interpretation: Statute requiring attestation of deed by witnesses: whether attestation of acknowledgment of signing is sufficient. 267

SUBROGATION.

See also *Suretyship*.

Lessee's right to assignment of prior mortgage on redemption. 558

Right of one forced to pay debt against real debtor. 380

Whether intending purchaser of old mortgage who takes new mortgage instead of assignment of old is

subrogated to rights of first mortgage as against a judgment creditor. 261, 273

SURETYSHIP.

Surety's defenses: variation of risk: Judgment affirmed by consent on an appeal bond. 461

Surety's defenses: omissions of creditor: Bank's failure to apply deposit of debtor on its claim against him. 763

Surety's right of subrogation: Nature of right. 261, 273, 380
Relation of depository's surety to state treasurer's surety. 558

T**TAXATION.**

See also *Conflict of Laws; Constitutional Law*.

General limitations on taxing powers: Delegation of taxing power: whether rendering exercise invalid. 257, 266

Purposes for which taxes may be levied: Gratuities to Civil War veterans. 92

Satisfaction of moral obligation. 277

Property subject to taxation: Articles in interstate commerce. 358, 375

Property received in lieu of dower: whether subject to inheritance tax. 276

Where property may be taxed: Corporation: conclusiveness of statement of location in charter. 266

Particular forms of taxation: Inheritance tax paid in two states. 381

Inheritance tax: whether property taken in lieu of dower is subject to tax. 276

TELEGRAPH AND TELEPHONE COMPANIES.

Status of company as engaged in public employment: Right to contract with competitor for division of territory. 761

TENANCY IN COMMON.

Voluntary partition by life tenants: whether binding on remaindermen. 275

TITLE, OWNERSHIP, AND POSSESSION.

Possession: Abandoned chattels. 272
Wild lands: what constitutes possession. 185

TORTS.

See *Admiralty; Agency; Corporations; Contributory Negligence; Libel and Slander; Joint Wrongdoers; Railroads (Look and listen rules); Trade Marks and Trade Names; Trover and Conversion*.

Nature of tort liability in general: Affirmative duties: relation of, to estoppel. 349, 372

Breach of child labor statute: whether action barred by deceit of child. 646, 660

Estoppel: relation of to affirmative duties in the law of torts. 349, 372

Liability without intent or negligence: in general. 531, 559

Motive: effect of bad, on act otherwise lawful. 740, 764

Criminal act: Liability for harm through failure to perform statutory duty. 531, 559

Interference with business: Effect of wrongful motive in sale of land. 740, 764

Unusual cases of tort liability: Fletcher v. Rylands: doctrine applied to blasting on land. 650

TRADE MARKS AND TRADE NAMES.

Equitable protection of trade name where no actual competition. 442, 462

References in heavy-faced type are to NOTES; in plain type to RECENT CASES; and in italicized type to ARTICLES.

TRADE UNIONS.

Strikes: Right to strike to compel discharge of non-union employee. 259, 277

TROVER AND CONVERSION.

What constitutes conversion: Repledging by order of fraudulent pledgor. 660

Who may sue: Bailee at will for conversion occurring after loss of possession. 381

Damages: Right to return converted property in mitigation of damages. 764

TRUSTS.

Nature of the trust relation: Trust distinguished from equitable charge. 559

Cestui's interest in the res: Apportionment of stock dividends between life tenant and remainderman. 77, 89
Right to reclaim after disclaimer. 660

Creation and validity: Land conveyed to grantee on oral trust for grantor. 661

V

VENDOR AND PURCHASER.

Rights and liabilities: Risk of loss in executory sale of land. 560

Remedies of purchaser: Specific performance against intervening

purchaser who takes with notice of option of plaintiff. 747, 763

VENUE.

See under *Constitutional Law*.

W

WATERS AND WATERCOURSES.

Natural watercourses: riparian rights: Flood waters: interest in of lower riparian owner. 278

Riparian rights: various doctrines in the United States 613-614

Natural lakes and ponds: Title to land under water formed by erosion of non-riparian owner's property. 185

Surface waters: Extent of rights: doctrine of reasonable use not applied to surface waters. 186

Conveyances and contracts: Assignment of riparian rights. 661

Public rights: Conservation of water-powers: in general. 601-630

— federal obstacles to conservation. 622-625

— interests of conservation not hostile to those of water-power owners. 628-629

— under state legislation. 625-628

Government control of private water-power dams. 614-622

WILLS.

See also *Equitable Election; Executors and Administrators; Parol Evidence Rule; Legacies and Devises*.

Incorporation by reference: What words are sufficient. 278

Fraud, undue influence, and mistake: Striking words out of will on ground of mistake. 212-236

Power of court of equity to strike words out of will. 212-214

Probate: Power of court to strike out words on ground of mistake. 215-223, 227-236

Striking out words on ground of mistake: what sort of mistake necessary. 223-227

Construction: Estates by implication. 382

"To dispose of in accordance with my instructions to her" construed as insufficient to incorporate by reference. 278

Revocation: Effect of revocation: disposition of revoked legacy. 382

WITNESSES.

Competency as to particular matters: Bastardizing the issue: admissibility of wife's testimony to prove adultery. 560

Privilege against self-incrimination: Application to compulsory statements out of court. 93

Extent of protection by immunity statute. 560

WORKMEN'S COMPENSATION ACTS.

See under *Master and Servant*.

BOOK REVIEWS.

	PAGE
ADAMS: The Origin of the English Constitution	385
AMES: Lectures on Legal History and Miscellaneous Legal Essays	765
ANSON: The Law and Custom of the Constitution. Vol. I: Parliament. Fourth Edition	190
BEROLZHEIMER: The World's Legal Philosophies	279
BLAKEMORE: The Inheritance Tax Law	563
BLACK: Handbook on the Law of Judicial Precedents	281
BOLLAND: The Eyre of Kent, 6 & 7 Edward II, 1313-14	387
BOUVÉ: A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States	662
BRISSAUD: A History of French Private Law	562
BROWN: The Underlying Principles of Modern Legislation	186
COLLINS: The Fourteenth Amendment and the States	664
CONTINENTAL LEGAL HISTORY SERIES: A General Survey of Events, Sources, Powers, and Movements in Continental Legal History	766
DE BEER: An Analysis of Salmond's Jurisprudence	96
FROST: A Treatise on the Incorporation and Organization of Corporations	768
HALSBURY: The Laws of England. Vols. XX, XXI	563
HERSHEY: The Essentials of International Law	767
HOURLICH: Immigration and Labor. The Economic Aspects of European Immigration to the United States	767
JENKS: A Short History of English Law	188
JUDSON: The Law of Interstate Commerce and its Federal Regulation. Second Edition	97
KRUEGER: Geschichte der Quellen und Litteratur des Roemischen Rechts	562
MCLAUGHLIN: The Courts, the Constitution, and Parties	280
MIRAGLIA: Comparative Legal Philosophy	383
NICHOLS: Taxation in Massachusetts	666
SALMOND: The Law of Torts. Third Edition	282
SEDGWICK: Damages. Ninth Edition	94
SHIELDS: Federal Courts and Practice	665
TIFFANY: Handbook of the Law of Banks and Banking	465
WALTON: Historical Introduction to the Roman Law	189
WILLOUGHBY: The Distinctions and Anomalies Arising out of the Equitable Doctrine of the Legal Estate	462
WOODWARD: The Law of Quasi Contracts	561
WRIGHTINGTON AND HOLLINS: Tax Exempt and Taxable Investment Securities	563
YOUNG: Foreign Companies and other Corporations	96

TABLE OF CASES.

References in heavy-faced type are to NOTES; all others are to RECENT CASES.

Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

	PAGE		PAGE
Abdul Kadir Ravuthan, Shamu		Bancroft v. Bancroft	560
Patter v.	268	Barnard Realty Co. v. Bonwit	758
Acord v. Beaty	275	Bartels Brewing Co., Gordon	
Adams Express Co., Alcorn v.	653	Malting Co. v.	650
Adams Express Co. v. Croninger	456	Bartron, Johnson v.	376
Adan, Patterson v.	373	Batley, Martin v.	177
Adler v. Martin	93	Beach v. Bradstreet	92
Aikin, Bryan v.	77, 89	Beaty, Acord v.	275
Alabama & Vicksburg Ry. Co.		Bellevue Borough v. Manufac-	
v. Morris	456	turers' Light & Heat Co.	759
Alabama Western R. Co., Alex-		Benjamin, <i>In re</i>	378
ander v.	556	Bennan v. Parsonnet	91
Alcorn v. Adams Express Co.	653	Bent, People v.	271
Alden v. Mayfield	372	Berry, Staples v.	547
Alexander v. Alabama Western		Bierce v. State National Bank	449
R. Co.	556	Bigelow v. Maine Central R. Co.	556
American Bill Posting Co. v.		Birmingham Waterworks Co. v.	
Geiger	182	City of Birmingham	183
American Gas & Electric Co.,		Blanchard, Wilbur v.	255, 268
Russell v.	75, 84	Bogue v. Gunderson	270
American Mfg. Co. v. Lindgren	179	Bonwit, Barnard Realty Co. v.	758
Andreas, Booth v.	269	Booth v. Andreas	269
Apgar v. Connell	661	Borden's Condensed Milk Co. v.	
Architctural Decorating Co.,		Borden's Ice Cream Co.	442, 462
National Surety Co. v.	368	Bradley & Cohn, Ltd., v. Ram-	
Ashford v. Mace	181	say & Co.	171, 183
Ashland Light, Mill, & Power		Bradstreet, Beach v.	92
Co., Lucas v.	439, 453	Bridge v. Kedon	174
Atchison, Topeka, & Santa Fé		Bridwell, Waters-Pierce Oil Co.	
Ry. Co., Stanley v.	531, 559	v.	175
Atlantic Coast Line R. Co. v.		Brooklyn Heights R. Co., Nu-	
Hinely-Stephens Co.	752	gent v.	638, 657
Auburn Telephone Co., Casey v.	658	Brown, Baker v.	753
Augusta-Aiken Ry. Co., Craig v.	369	Brown v. Kistleman	74, 88
Ayers, International Corre-		Brown City Savings Bank v.	
spondence Schools v.	83	Windsor	362, 365
Baker v. Brown	753	Brown-Ketcham Iron Works v.	
Baker Mfg. Co., Zwolanek v.	274	George B. Swift Co.	749, 756
Baltimore & Ohio R. Co. v.		Brown, State <i>ex rel.</i> Mays v.	636, 655
Gawinske	273	Browning, Wiggin v.	349, 372
		Bryan v. Aikin	77, 89

	PAGE		PAGE
Building and Engineering Co. v.		Commonwealth, Simpson v.	550
Northern Bank	366	Connell, Apgar v.	661
Burgoyne v. Mallett	180	Connell v. Gray	450
Buttner v. Kasser	458	Constant v. Klompus	356, 377
		Converse v. Hamilton	91
Carlesi, People v.	644, 659	Cook, Wilson v.	536, 548
Canadian Northern Ry. Co. v.		Cooper, Flandermeyer v.	74, 88
Senske	760	Coppage, State v.	83
Carlile, St. Louis, Iron Moun-		Corning Irrigation Co., Gallatin	
tain & Southern Ry. Co. v. . .	653	v.	278
Casey v. Auburn Telephone Co.	658	Cornish, Curtis v.	378
Cedar Rapids & M. C. Ry. Co.,		Cotner, State v.	370
Hoffman v.	552	County Commissioners of Cook,	
Central Lumber Co. v. South		Witter v.	744, 753
Dakota	369	Cowderoy, Kirby v. ([1912] A. C.	
C. E. Stevens Land Co., First		599)	184
State Bank of Mountain Lake		Cowherd, Murray v.	174
v.	461	Cowley v. Shields	548
Chaplin, Volcanic Oil & Gas Co.		Cox, Weathers v.	377
v.	185	Craig v. Augusta-Aiken Ry. Co.	369
Chicago, Burlington, & Quincy		Crandall & Godley, Godley v. . .	451
R. Co., City of Osceola v. . .	177	Crane, Franklin v.	552
Chicago, Milwaukee, & St. Paul		Crawford v. Gilchrist	455
Ry. Co., State v.	360, 367	Creasy, <i>Ex parte</i>	265
City of Birmingham, Birming-		Creswill v. Grand Lodge Knights	
ham Waterworks Co. v. . . .	183	of Pythias (225 U. S. 246) . .	86
City of Bisbee v. Arizona Ins.		Croft, Wolfe v.	559
Agency	454	Croninger, Adams Express Co. v.	456
City of Leavenworth, Ewing v.	457	Cumberland Tel. Co., McKin-	
City of Lynchburg, Loyd's Ex-		ley Tel. Co. v.	761
ecutorial Trustees v.	266	Cunningham v. Cunningham	253, 265
City of Manchester, Harrington		Curtis v. Cornish	378
v.	85	Curtis, Varney v.	660
City of New York, Panama Re-			
alty Co. v.	460	D'Altomonte v. New York Her-	
City of Omaha, Missouri Pacific		ald Co.	759
Ry. Co. v.	169, 183	Daniels, Smith, State <i>ex rel.</i> v. .	83
City of Osceola v. Chicago, Bur-		Davenport v. Palmer	365
lington, & Quincy R. Co. . .	177	Davis, State v.	550
City of Philadelphia, Longstreth		Davis v. Vidal	459
v.	277	De Bary & Co. v. Louisiana	533, 555
City of Pittsburgh v. Van Essen	371	Delafield, Ellis v.	437, 450
City of Richmond, Eubank v. .	367	Delavan v. New York, New	
Chicago Varnish Co. v. Hargood		Haven & Hartford R. Co. 179,	550
Realty & Construction Co. .	458	Delaware, Lackawanna & West-	
Clay & Sons, Ltd., Griffith v.	90	ern R. Co., Pedersen v.	354, 374
Cochran v. Stein	167, 178	Denver City Tramway Co. v.	
Cochrane v. McDermott Adver-		Gawley	642, 656
tising Agency	657	De Soto Coal, Mining, & De-	
Colorado & Southern Ry. Co. v.		velopment Co. v. Hill	646, 660
Railroad Commission	659	Devonshire, The [1912] A. C.	
Columbia-Knickerbocker Trust		634	264
Co. v. Miller	265	Division No. 241, Amalgamated	
Commissioners of Land Office,		Association of Street and Elec-	
People <i>ex rel.</i> Cayuga Nation		tric Ry. Employees of Amer-	
of Indians v.	277	ica, Kemp v.	259, 278

	PAGE		PAGE
Donnelly v. United States . . .	755	Gehling, Frederick v.	261, 273
Douglas v. Stokes	275	Geiger, American Bill Posting Co. v.	182
Dreyfuss-Weil Co., Nashville, Chattanooga & St. Louis Ry. Co. v.	367	George B. Swift Co., Brown-Ketcham Iron Works Co. v.	749, 756
Dublin Corporation, <i>In re</i> . . .	453	Germania Fire Ins. Co., Grollimund v.	80, 88
Effer v. State	656	Ghirardelli Co. v. Hunsicker . . .	640, 659
Ellis v. Delafield	437, 450	Gilchrist, Crawford v.	455
Emerson v. Emerson	441, 453	Gilvin, National Bank of Commerce v.	763
Etchison Drilling Co. v. Flournoy	549	Glaser, Pacific Mutual Life Ins. Co. v.	366
Eubank v. City of Richmond . .	367	Glenwood Cotton Mills, Willis v.	557
Everwear Hosiery Co., Manufacturers' & Merchants' Inspection Bureau v.	553	Glinnan v. Phelan	754
Ewing v. City of Leavenworth .	457	Goben, State <i>ex rel.</i> Frank v. . .	555
"Express Co.'s Appeal"	72, 92	Godley v. Crandall & Godley Co. .	451
Feilen, State v.	163, 175	Goldberg & Lewis, Stone v. . . .	652
Feinman, People v.	375	Good v. Jarrard	560
Fesmore, Missouri, Kansas, & Texas Ry. Co. v.	354, 374	Gordon Malting Co. v. Bartels Brewing Co.	650
Fidelity & Deposit Co., Potter v. .	92	Grace, Smith, & Co., Lloyd v. . .	449
First State Bank of Mountain Lake v. C. E. Stevens Land Co.	461	Graham v. West Virginia	84
Fitzgerald v. Flanagan	89	Grand Lodge Knights of Pythias, Creswill v. (225 U. S. 246) .	86
Fitzwater v. Warren	262, 272	Gray, Connell v.	450
Flanagan, Fitzgerald v.	89	Gray, Roberts v.	455
Flandermeyer v. Cooper	74, 88	Great Western Machine Co. v. Smith	172, 175
Flournoy, Etchison Drilling Co. v.	549	Griffith v. Clay & Sons, Ltd. . .	90
Flynn v. Manson	185	Griswold v. Griswold	536, 548
Forest Home Cemetery Co., People <i>ex rel.</i> Gaskill v.	761	Grollimund v. Germania Fire Ins. Co.	80, 88
Frankfort Marine, Accident, & Plate Glass Ins. Co., Schultz v.	658	Gunderson, Bogue v.	270
Franklin v. Crane	552	Halston, <i>In re</i>	90
Frederick v. Gehling	261, 273	Hamburg-Amerikanische Pachtfahrt Actien Gesellschaft, Schweitzer v.	459
Freeholders of Cape May County, Van Gelder v.	87	Hamilton, Converse v.	92
Gallagher, State v.	452	Hannes v. Nederland Israelitish Sick Fund	180
Gallatin v. Corning Irrigation Co.	278	Hargood Realty & Construction Co., Chicago Varnish Co. v. . .	458
Garns v. Rollins	186	Harrington v. City of Manchester	85
Garrison v. Sun Printing & Publishing Association	87	Harsin v. Oman	176
Gawinske, Baltimore and Ohio R. Co. v.	273	Hartford Fire Ins. Co., Marqusee v.	264
Gawley, Denver City Tramway Co. v.	642, 656	Haskins v. Oklahoma City . . .	273
Geer, St. Louis, San Francisco, & Texas Ry. Co. v.	374	Haven, Title Guarantee & Trust Co. v.	634, 651
		Hay, Hunt v.	755
		Hazelton, <i>In re</i>	382

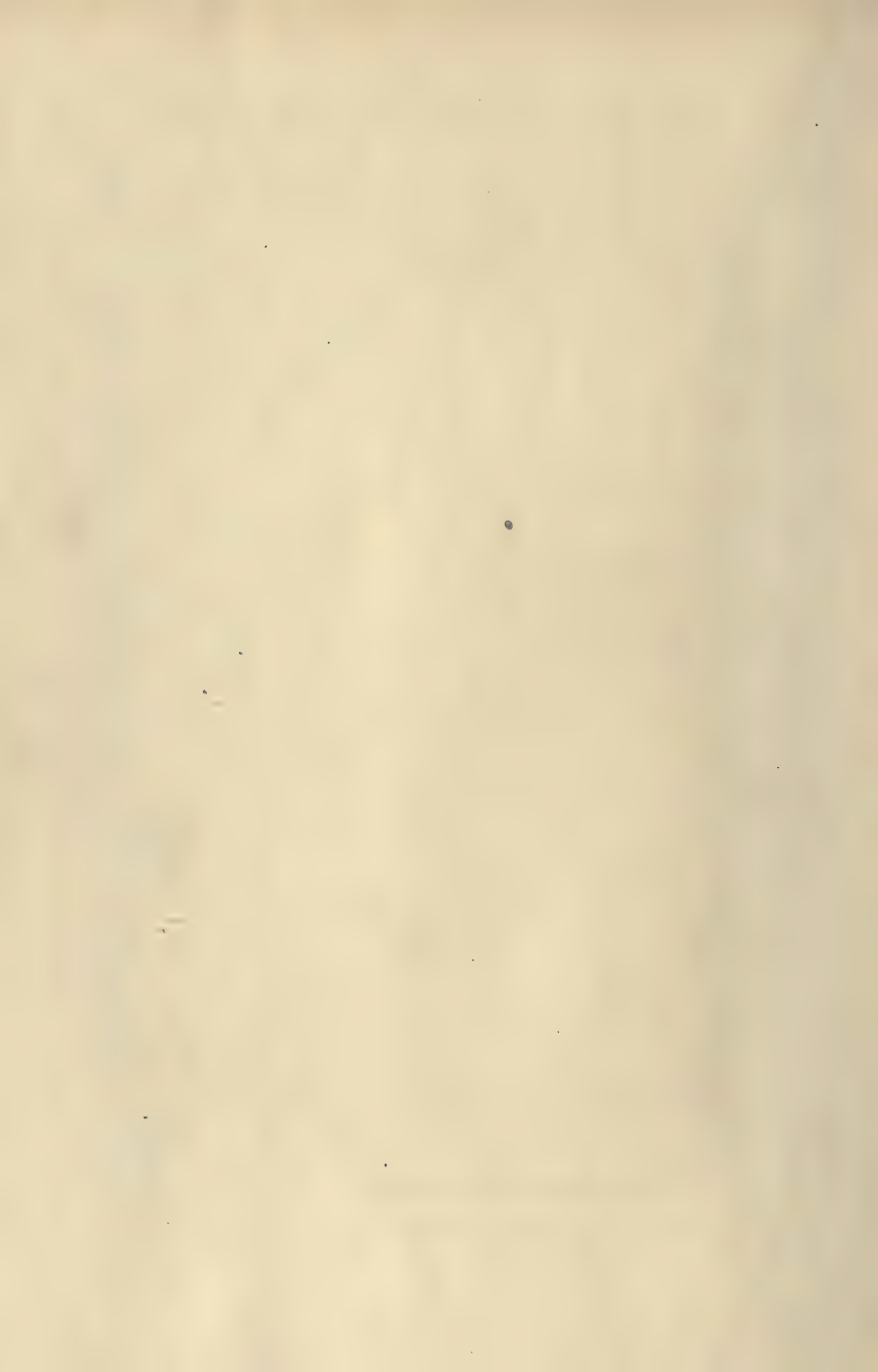
	PAGE		PAGE
Healy v. New York Central & Hudson River R. Co.	651	Kasser, Buttner v.	458
Heike v. United States	560	Kedon, Bridge v.	174
Herman, Shaeffer v.	461	Kemp v. Division No. 241, Amalgamated Association of Street & Electric Ry. Employees of America	259, 278
Heuchtker, Steward Dry Goods Co. v.	175	Kepreta, McCarty v.	652
Hill, De Soto Coal Mining & Development Co. v.	646, 660	Ketterer, Hopkins v.	558
Hill v. Murphy	267	Key, <i>Ex parte</i>	85
Hinely-Stephens Co., Atlantic Coast Line R. Co. v.	752	Kirby v. Cowderoy ([1912] A. C. 599)	185
Hocking Valley Ry. Co., United States v.	82	Kistleman, Brown v.	74, 88
Hoffman v. Cedar Rapids & M. C. Ry. Co.	552	Klompus, Constant v.	356, 377
Hoke v. United States	657	Kneedler, <i>Ex parte</i>	94
Holbrook v. Morrison	740, 764	Lacey v. Southern Mineral Land Co.	544, 552
Holt & Co., <i>In re</i>	358, 375	Lake Shore & M. S. Ry. Co., Stoneboro and Chautauqua Lake Ice Co. v.	742, 762
Hopkins v. Ketterer	558	Landry v. Mandelstam	381
Horgan v. Russell	747, 763	Lieutenant Governorship, <i>In re</i>	655
Hosmer v. Republic Iron & Steel Co.	760	Light, McCarty v.	752
Hounsoume v. Vancouver Power Co.	650	Lilly-Brackets Co. v. Sonnenmann	375
Howell, State <i>ex rel.</i> Reynolds v.	269	Lindgren, American Mfg. Co. v.	179
Huetter, Pacific Tel. & Tel. Co. v.	85	Lloyd v. Grace, Smith, & Co.	449
Hughes, Jones v.	347, 374	Long v. Long	270
Hughes, Louisville & Nashville R. Co. v.	757	Longstreth v. City of Philadelphia	277
Humphrey v. Ogden	87	Louisiana, De Bary & Co. v.	533, 555
Hunsicker, Ghirardelli Co. v.	640, 659	Louisville & Nashville R. Co. v. Hughes	757
Hunt v. Hay	755	Lowe, Spencer v.	730
Hyde v. United States (225 U. S. 347)	83	Lowther, Mutual Life Ins. Co. v.	271
International Correspondence Schools v. Ayers	84	Lowther v. Potter	276
Inter-Southern Life Ins. Co. v. Milliken	266	Loyd's Executorial Trustees v. City of Lynchburg	266
Isman, Raff v.	542, 550	Lucas v. Ashland Light, Mill, & Power Co.	439, 453
Jane v. Martinez	754	Lynch, Purity Extract and Tonic Co. v. (226 U. S. 192)	266
Jarrard, Good v.	560	Mace, Ashford v.	181
Jobson's Estate, <i>In re</i>	546	Machen & Mayer Electrical Mfg. Co., Machen v.	451
Johnson v. Bartron	376	MacKenzie v. The Scotia Lumber Co.	764
Jones v. Hughes	347, 374	Magnus v. Magnus	278
Jones, Small v.	182	Mahoney, Mentz's Assignee v.	380
Jones v. Springer	364	Maine Central R. Co., Bigelow v.	556
Joyce v. West Jersey & Seashore R. Co.	93	Mallet, Burgoyne v.	180
Joyner, Yale Jewelry Co. v.	374	Mallory, Vosburg v.	86
Kansas City, Kansas City Gas Co. v.	270		
Kansas City Gas Co. v. Kansas City	270		

	PAGE		PAGE
Mandelstam, Landry v. . . .	381	National Bank of Commerce v.	
Manson, Flynn v. . . .	185	Gilvin	763
Manufacturers' & Merchants'		National Surety Co. v. Architec-	
Inspection Bureau v. Ever-		tural Decorating Co.	368
wear Hosiery Co.	553	Nederland Israelitish Sick Fund,	
Manufacturers' Light & Heat		Hannes v.	180
Co., Bellevue Borough v. . .	759	Nelson v. McKee	261, 273
Martin, Adler v.	93	New York Central & Hudson	
Martinez, Jane v.	754	River R. Co., Healy v. . . .	651
Marqusee v. Hartford Fire Ins.		New York Christian Missionary	
Co.	264	Society, Southwick v. . . .	176
Martin v. Battey.	178	New York City Ry. Co., Penn-	
Massachusetts Fan Co., Mc-		sylvania Steel Co. v. (198 Fed.	
Creery Engineering Co. v. . .	88	721, 735)	72, 92
Mayfield, Alden v.	372	New York City Ry. Co., Penn-	
Mayo's Will, <i>In re</i>	91	sylvania Steel Co. v. (198	
McCarty v. Light	752	Fed. 721)	165, 184
McCarty v. Kepreta	652	New York Herald Co., D'Alto-	
McCreery Engineering Co. v.		monte v.	759
Massachusetts Fan Co. . . .	88	New York Life Ins. Co., Slocum	
McDermott v. State of Wiscon-		v.	738, 754
sin	757	New York, New Haven & Hart-	
McDermott Advertising Agency,		ford R. Co., Delavan v. . .	179, 550
Cochrane v.	657	New York, Susquehanna &	
McKee, Nelson v.	261, 273	Western R. Co., Pierson v.	
McKinley Tel. Co. v. Cumber-		354, 374
land Tel. Co.	761	Northern Bank, Building & En-	
McNair & Wade Land Co. v.		gineering Co. v.	366
Parker	453	Nugent v. Brooklyn Heights R.	
Mentz's Assignee v. Mahoney.	380	Co.	638, 657
Michigan Central R. Co. v.		Ogden, Humphrey v.	87
Vreeland	551	O'Keefe v. Staples Coal Co. . .	751
Miller, Columbia-Knickerbocker		Oklahoma City, Haskins v. . .	273
Trust Co. v.	265	Oman, Harsin v.	176
Miller, White v.	555	Opinion of the Justices, <i>In re</i>	78, 88
Milliken, Inter-Southern Life		Opinion of the Justices, <i>In re</i>	93
Ins. Co. v.	266	Osburn v. Rochester Trust &	
Minsinger v. Rau	257, 266	Safe Deposit Co.	382
Missouri, Kansas & Texas Ry.		Pacific Mutual Life Ins. Co. v.	
Co. v. Fesmire	354, 374	Glaser	366
Missouri Pacific Ry. Co. v. City		Pacific Tel. & Tel. Co. v. Huetter	85
of Omaha	169, 183	Palmer, Davenport v.	365
Morris, Alabama & Vicksburg		Panama Realty Co. v. City of	
Ry. Co. v.	456	New York	460
Morrison, Holbrook v. . . .	740, 764	Parker, McNair & Wade Land	
Muller, Perlsburg v.	377	Co. v.	453
Murphy, Hill v.	267	Parsonet, Bennan v.	91
Murray v. Cowherd	174	Patten, United States v. . . .	461
Muthukrishnien v. Virarag-		Patterson v. Adan	373
hava Iyer	274	Patterson, United States v. . .	762
Mutual Life Ins. Co. v. Lowther	271	Pedersen v. Delaware, Lacka-	
Narregang v. Narregang . . .	551	wanna, & Western R. Co. 354, 374	
Nashville, Chattanooga & St.		Pennsylvania Steel Co. v. New	
Louis Ry. Co. v. Dreyfuss-		York City Ry. Co.	72, 92
Weil Co.	367		

	PAGE		PAGE
Pennsylvania Steel Co. v. New York City Ry. Co. (198 Fed. 721)	165, 184	St. Louis, San Francisco, & Texas Ry. Co. v. Geer	374
People v. Bent	271	Sanford's Estate, <i>In re</i>	276
People v. Carlesi	644, 659	Schultz v. Frankfort Marine, Accident, & Plate Glass Ins. Co.	658
People <i>ex rel.</i> Cayuga Nation of Indians v. Commissioners of Land Office	277	Schweitzer v. Hamburg-Americanische Packetfahrt Actien Gesellschaft	459
People v. Feinman	375	Scotia Lumber Co., The MacKenzie v.	764
People <i>ex rel.</i> Gaskill v. Forest Home Cemetery Co.	761	Selover, Bates & Co. v. Walsh .	367
People v. Union Trust Co. . . .	381	Senske, Canadian Northern Ry. Co. v.	760
Perlsburg v. Muller	377	Shaeffer v. Herman	461
Phelan, Glinnan v.	754	Shamu Patter v. Abdul Kadir Ravuthan	268
Phillip's Estate	756	Shields, Cowley v.	548
Pierson v. New York, Susquehanna & Western R. Co. 354,	374	Simon, <i>In re</i>	264
Pink, <i>In re</i>	445, 455	Simpson v. Commonwealth . . .	550
Pons v. Yazoo & Mississippi Valley R. Co.	184	Slocum v. New York Life Ins. Co.	738, 754
Potter v. Fidelity & Deposit Co. .	92	Small v. Jones	182
Potter, Lowther v.	276	Smith, Great Western Machine Co. v.	172, 175
Powell, Winters v.	762	Smith v. Stanley	372
Prairie Oil & Gas Co. v. United States	631, 655	Smith, State <i>ex rel.</i> v. Daniels .	83
Pulitzer Publishing Co., Tilles v. .	88	Sonnemann, Lilly-Brackett Co. v.	375
Purity Extract and Tonic Co. v. Lynch (226 U. S. 192)	266	South Dakota, Central Lumber Co. v.	369
Raff v. Isman	542, 550	Southern Mineral Land Co., Lacey v.	544, 552
Railroad Commission, Colorado & Southern Ry. Co. v.	659	Southwick v. New York Christian Missionary Society . . .	176
Ramsay & Co., Bradley & Cohn, Ltd. v.	171, 183	Sparks v. Weatherly	82
Rau, Minsinger v.	257, 266	Spencer v. Lowe	370
Reading Co., United States v. . .	379	Springer, Jones v.	364
Republic Iron & Steel Co., Hosmer v.	760	Standard Sanitary Mfg. Co. v. United States (226 U. S. 20) .	275
Rex v. White	272	Stanley v. Atchison, Topeka, & Santa Fé Ry. Co.	531, 559
Riggs, Wentworth v.	751	Stanley, Smith v.	372
Roberts v. Gray	455	Stannard v. Wilcox & Gibbs Sewing Machine Co.	181
Robitaille, <i>In re</i>	268	Staples v. Berry	547
Rochester Trust & Safe Deposit Co., Osburn v.	382	Staples Coal Co., O'Keefe v. . .	751
Rollins, Garns v.	186	State v. Chicago, Milwaukee & St. Paul Ry. Co.	360, 367
Roth v. Roth	553	State v. Coppage	83
Russell v. American Gas & Electric Co.	75, 84	State v. Cotner	371
Russell, Horgan v.	747, 763	State v. Davis	550
Rutland R. Co., Sabre v.	744, 753	State, Effler v.	656
Sabine Tram Co., Texas & New Orleans R. Co. v.	554	State v. Feilen	163, 175
Sabre v. Rutland R. Co.	744, 753	State <i>ex rel.</i> Frank v. Goblen . .	55
St. Louis, Iron Mountain, & Southern Ry. Co. v. Carlile . .	653	State v. Gallagher	452

	PAGE		PAGE
State <i>ex rel.</i> Mays v. Brown	636, 655	United States, Hyde v. (225 U. S. 347)	83
State <i>ex rel.</i> Nebraska Republican State Central Committee v. Wait	351, 371	United States v. Patten	461
State <i>ex rel.</i> Reynolds v. Howell	269	United States v. Patterson	762
State of Wisconsin, McDermott v.	757	United States, Prairie Oil and Gas Co. v.	631, 655
State v. Stow	452	United States v. Reading Co.	379
State v. Sutton	360, 367	United States, Standard Sanitary Mfg. Co. v. (226 U. S. 20)	275
State v. Western & Atlantic R. Co.	539, 554	United States, Texas & Pacific Ry. Co. v.	757
State National Bank, Bierce v.	449	United States v. Union Pacific R. Co.	379
Stathatos v. Stathatos	447, 450	United States Fidelity & Guaranty Co. v. Title Guaranty & Surety Co.	558
Stein, Cochran v.	167, 178	Vancouver Power Co., Hounsesome v.	650
Steward Dry Goods Co. v. Heuchtker	175	Van Essen, City of Pittsburgh v.	371
Stokes, Douglas v.	275	Van Gelder v. Freeholders of Cape May County	87
Stone v. Goldberg & Lewis	652	Varney v. Curtis	660
Stoneboro & Chautauqua Lake Ice Co. v. Lake Shore & Michigan Southern Ry. Co.	742, 762	Victoria Silicate Brick Co., Ltd., <i>In re</i>	540, 550
Stow, State v.	452	Vidal, Davis v.	459
Street, Whitehead v.	758	Viraraghava Iyer, Muthrukrishnien v.	274
Sun Printing & Publishing Association, Garrison v.	87	Volcanic Oil & Gas Co. v. Chaplin	185
Supreme Council Royal Arcanum, Wilcox v.	178	Vosburg v. Mallory	86
Sutton, State v.	360, 367	Vreeland, Michigan Central R. Co. v.	551
Swift, Brown-Ketcham Iron Works v.	749, 756	Wait, State <i>ex rel.</i> Nebraska Republican State Central Committee v.	351, 371
Szlauzis v. Szlauzis	739, 756	Walsh, Selover, Bates & Co. v.	367
Taylor v. Yorkshire Ins. Co.	547	Warren, Fitzwater v.	262, 272
"Termination of Lease Proceeding" (198 Fed. 721)	165, 184	Waters-Peirce Oil Co. v. Bridwell	175
Texas & New Orleans R. Co. v. Sabine Tram Co.	554	Weatherly, Sparks v.	82
Texas & Pacific Ry. Co. v. United States	757	Weathers v. Cox	377
Thompson v. Thompson	449	Wentworth v. Riggs	751
Tilles v. Pulitzer Pub. Co.	89	Western & Atlantic R. Co., State v.	539, 554
Title Guaranty & Surety Co., United States Fidelity & Guaranty Co. v.	558	West Jersey & Seashore R. Co., Joyce v.	93
Title Guarantee & Trust Co. v. Haven	634, 651	West Virginia, Graham v.	84
Union Pacific R. Co., United States v.	379	White v. Miller	555
Union Trust Co., People v.	381	White, Rex v.	272
United States, Donnelly v.	755	Whitehead v. Street	758
United States, Heike v.	560	Wiggin v. Browning	349, 372
United States v. Hocking Valley Ry. Co.	82	Wilbur v. Blanchard	255, 268
United States, Hoke v.	657		

	PAGE		PAGE
Wilcox & Gibbs Sewing Machine Co., Stannard <i>v.</i>	181	Yale Jewelry Co. <i>v.</i> Joyner . . .	374
Wilcox <i>v.</i> Supreme Council Royal Arcanum	178	Yazoo & Mississippi Valley Ry. Co., Pons <i>v.</i>	184
Williams, Estate of	752	York Haven Paper Co., York Haven Water & Power Co. <i>v.</i>	661
Willis <i>v.</i> Glenwood Cotton Mills	557	York Haven Water & Power Co. <i>v.</i> York Haven Paper Co.	661
Wilson <i>v.</i> Cook	536, 548	Yorkshire Ins. Co., Taylor <i>v.</i> . .	547
Windsor, Brown City Savings Bank <i>v.</i>	365	Young, <i>In re</i>	660
Winters <i>v.</i> Powell	762	Zwolanek <i>v.</i> Baker Mfg. Co. . .	274
Witter <i>v.</i> County Commissioners of Cook	744, 753		
Wolfe <i>v.</i> Croft	559		



HARVARD LAW REVIEW.

VOL. XXVI.

NOVEMBER, 1912.

No. 1.

JUDICIAL CONSTRUCTION OF THE FOURTEENTH AMENDMENT.

THE subject of this article is the judicial definition of the following language of the Fourteenth Amendment to the federal Constitution:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The first clause protects only the privileges and immunities of citizens of the United States as such and not the privileges and immunities that belong of right to the citizens of all free governments. For the protection of the latter citizens must look to the states.¹ Most of the cases have arisen under the clauses securing to every person due process of law and to every person within the jurisdiction of a state the equal protection of the laws. It was intimated by the majority of the court in the Slaughter House cases that this clause also might be narrowly construed. Within three years after that decision the *dicta* were overruled, and it was assumed, apparently without question, that railroad corporations and owners of elevators had the right to appeal to the federal courts for protection

¹ Slaughter House Cases, 16 Wall. (U. S.) 36 (1872).

against hostile legislation of Illinois, Wisconsin, and Iowa.² In the forty years that have since passed every word of these clauses has been defined.

WHAT IS ACTION BY THE STATES?

The action prohibited is action by the state. The question whether the prohibition is limited to action by the state government, — the legislature, — or extends to action by executive or administrative officers and by the courts of justice, soon arose in cases involving the right of colored men in the southern states to have men of their own race and color upon grand and petit juries. It was considered in three cases, one from West Virginia and two from Virginia.³ The statutes of West Virginia excluded colored persons from juries. This was legislative action and clearly came within the prohibition against state action. The court held that Congress had the power to enforce by legislation the rights secured by the amendment, and that the act of Congress authorizing a removal of the cause to the federal courts was valid. The effect of the decision was to subject state legislation as to the constitution of juries to review by the federal courts.

In the Virginia cases the situation was different. Under the constitution and statutes of Virginia colored men were not excluded from juries. Their rights were not infringed by action of the state itself. If infringed at all, it was by the method of impaneling the jury and conducting the trial. The court held that the act of Congress authorizing the removal of causes did not apply, since it authorized only the removal of the case before trial and no one could know in advance of trial whether the right was to be infringed by judicial action or not. It was, however, distinctly said that the prohibitions of the amendment extended to all action of the state whether it acted by its legislative, its executive, or its judicial authorities.

In the third case a judge charged by the law of Virginia with the selection of jurors was indicted in a federal court because he excluded citizens of African race and black color from the jury lists.

² *Munn v. Illinois*, 94 U. S. 113 (1876).

³ *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Virginia v. Rives*, 100 U. S. 313 (1879); *Ex parte Virginia*, 100 U. S. 339 (1879).

The attorney general of Virginia petitioned for a writ of *habeas corpus*. The case involved the action of a judicial officer, and the construction of a section of the act of Congress making it a misdemeanor to disqualify for service as a grand or petit juror any citizen on account of race, color, or previous condition of servitude. The question was whether it was within the power of Congress under the Constitution to interfere with the method of selecting jurors in state courts. It was held that under the clauses of the Thirteenth and Fourteenth Amendments authorizing appropriate legislation to enforce them, Congress had the power to pass the act in question, and that

“whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce the submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”

Although the power of the national government through congressional legislation to restrict the powers of the states to control the selection of jurors in their own courts, obviously trenches seriously upon the sovereignty of the states as it existed before the adoption of the amendment, the court held that it was no invasion of state sovereignty, since the people of the states had by the amendment empowered Congress to act. The language used as to the meaning of action by the state was very broad:

“Whoever, by virtue of public position under a State government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name of and for the State, and is clothed with the State’s power, his act is that of the State. This must be so or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.”

All these cases arose under acts of Congress and involved only the power of the court to enforce such an act. They did not involve its power by judicial action alone to protect individuals against unconstitutional statutes.

The next year the court went further.⁴ The law of Delaware,

⁴ Neal v. Delaware, 103 U. S. 370 (1880).

as construed by the state courts, did not exclude colored men from juries. They were in fact excluded by the jury commissioners who made up the lists. A colored man moved to quash the indictment against him because in the selection of jurors his race was excluded and discriminated against by reason of their color. The state court refused to quash. Upon his conviction, he appealed to the United States Supreme Court upon the ground that he had been denied a right secured to him by the United States Constitution. His contention was sustained and the conviction reversed. In effect the action of the jury commissioners was held to be an act of the state prohibited by the amendment.

The distinction between state action and action of individuals is important. In 1876 it was decided that Congress could not legislate for the protection of the rights to due process of law and the equal protection of the laws against the acts of individuals. The Chief Justice said:

"The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."⁵

The question soon arose in another form. Congress in 1875 by the Civil Rights Act enacted that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement, and made it a misdemeanor for any person to violate the act by denying to any citizen except for reasons applicable to citizens of every race and color and regardless of any previous condition of servitude, full enjoyment of any of the privileges mentioned. The act was an attempt to regulate the conduct of individuals toward black men. Congress had no power to enact the statute except under the Fourteenth Amendment. The court held that it was not justified thereby.⁶ Mr. Justice Bradley said:

"Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by

⁵ *United States v. Cruikshank*, 92 U. S. 542, 555 (1875).

⁶ *Civil Rights Cases*, 109 U. S. 3 (1883).

power given to Congress to legislate for the purpose of carrying such prohibition into effect. Until some State law has been passed or some State action through its officers or agents has been taken adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceedings under such legislation can be called into activity, for the prohibitions of the amendment are against State laws and acts done under State authority."

The legislative power of Congress for the enforcement of the Fourteenth Amendment is therefore limited to carrying out the prohibitions against state action, and does not extend to positive legislation securing to the individual the rights that the states were forbidden to deny him. The decision does not, however, prevent a review by the federal courts of the action of state authorities when that action violates the rights secured by the amendment as in *Neal v. Delaware*. Action of state courts adverse to rights secured by the amendment is subject to review by the federal courts.

It seems quite clear that acts of state officials in violation of state law cannot properly be considered acts of the state. So the court has held. It is for the states to enforce their own laws when violated by their own officials.⁷ This rule, however, does not always prevent action by the federal tribunals where state officials by their administration of the law infringe on the rights secured by the amendment in spite of general provisions of the state constitution or statutes which in themselves are in harmony with the amendment. Where, therefore, a state board of equalization applied to one class of corporations a system of valuation differing wholly from that applied to other corporations of the same class, resulting in discrimination of a serious and material nature, through a mistake of method and not a mere difference of opinion, they were held subject to injunction by the federal court, even though their action was in violation of the express requirement of the state constitution requiring taxation of property in proportion to its value.⁸

The state may act not only through its legislature, courts, or administrative officers, but may delegate authority to municipalities. When municipalities in pursuance of authority delegated to them by the state, exercise legislative power, their proceedings by by-

⁷ *Barney v. City of New York*, 193 U. S. 430 (1904).

⁸ *Raymond v. Chicago Traction Co.*, 207 U. S. 20 (1907).

law or ordinance have the force of law within the limits of the municipality and may properly be considered as law, that is as acts of the state.⁹

Not only is the rule applicable to the legislature, the judicial tribunals, administrative officers, and the subordinate agencies of the state, but also to the action of the people themselves, for a constitution cannot be adopted by the people of a state which shall override the provisions of the amendment. If that were permissible, the amendment would lose all force, since it would only be necessary to embody the legislation in the form of the fundamental law instead of the form of a legislative enactment.

THE ELEVENTH AMENDMENT.

The Eleventh Amendment provides that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state. The amendment is applicable also to suits against a state by its own citizens.¹⁰ It was early decided, however, that the United States Supreme Court was not thereby prevented from reviewing the action of a state court by writ of error even when the state was a party on the record, and that the judicial power of the United States could be invoked whenever the correct decision of the case depended on the construction of the Constitution or a law of the United States.¹¹ The question of the extent of the power of the federal courts to enforce rights secured by the Fourteenth Amendment by proceedings against adverse state action has of recent years become of increasing importance, especially in cases affecting the regulation of railways and railway rates.¹²

Within a few years, state legislatures in order to escape from interference by the federal courts with the enforcement of state statutes have enacted drastic laws obviously intended to prevent the railroad companies from seeking the federal courts except at

⁹ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

¹⁰ *Hans v. Louisiana*, 134 U. S. 1 (1890) (even in a case arising under the Constitution or laws of the United States).

¹¹ *Cohens v. Virginia*, 6 Wheat. (U. S.) 264 (1821).

¹² *Fitts v. McGhee*, 172 U. S. 516 (1899); *Ex parte Young*, 209 U. S. 123 (1908); *Prout v. Starr*, 188 U. S. 537 (1903).

the risk of ruinous penalties in the event of failure in the litigation. Since the question in dispute might be one of some nicety and the decision might be doubtful, no corporation could safely take the risk of contesting under a Minnesota statute prescribing such penalties for a violation of the orders of the railroad and warehouse commission of that state. Injunctions were issued by federal courts restraining the railroad companies from reducing their tariffs to the statutory rates, and restraining the attorney general of Minnesota from enforcing the remedies or penalties prescribed. Notwithstanding the injunction the attorney general secured an alternative mandamus in a state court against one of the railroad companies. For this he was adjudged in contempt of the federal court. Upon appeal to the Supreme Court it was argued that the political or governmental powers of the state were involved; that the injunction of the federal court interfered with the administration of the criminal law of the state; that the right of a citizen to test the constitutionality of a statute under the federal Constitution could be preserved by allowing an appeal to the Supreme Court after, instead of before, the determination of the cause in the state court. The court did not decide whether the Eleventh Amendment must yield to the later expression of the will of the people contained in the Fourteenth. It assumed that each amendment existed in full force and that the Eleventh Amendment must have all the effect it naturally would have without cutting it down or rendering its meaning any more narrow than the language fairly interpreted would warrant. The case was decided against the attorney general upon the ground that individuals who as officers of the state are clothed with some duty in regard to the enforcement of the laws of the state and threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce, against any parties affected, an unconstitutional act violating the federal Constitution, may be enjoined by a federal court from such action. The qualification which required that the state officer, in order that the federal courts might enjoin his action, should be clothed with some duty in regard to the enforcement of the laws of the state, was necessary, because nine years before¹⁶ the court had decided that a suit brought by the receivers of a railroad against

¹⁶ *Fitts v. McGhee*, 172 U. S. 516 (1899).

law officers of Alabama to restrain the enforcement of the act reducing tolls was a suit against the state, and within the prohibition of the Eleventh Amendment; for it was said that if a case could be made for the purpose of testing the constitutionality of a statute by restraining law officers of the state who had no special relation to the statute alleged to be unconstitutional, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was in a general sense charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. In the later case the court said:

"the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. . . . If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The court disclaimed any power to restrain a state court from acting in any case brought before it, either of a civil or criminal nature, or any power to prevent any investigation or action by a grand jury. It was said that the grand jury was a part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our government; that if an injunction against an individual is disobeyed and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account. Notwithstanding this reservation of the rights of the court and the grand jury, the decision is of the utmost importance, since it may well be doubted whether the reservation will be very effective in view of the right to enjoin individuals, including public officials, from prosecuting. The distinction between *Fitts v. McGhee* and *Ex parte Young* is difficult to follow; it may be that the later decision was thought to be required by the fact that the penalties, held *in terrorem* in the event of failure in

the litigation, made redress by the ordinary method of appeal after an adverse decision in the state courts an ineffective remedy. The legal rule was broadened to meet the new condition.

CORPORATIONS ARE PERSONS.

One clause of the amendment protects citizens of the United States, and provides that no state shall make or enforce any law which shall abridge their privileges or immunities. The other clauses protect persons, and provide that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The scope of the first clause had prior to the decision in the Slaughter House cases been restricted by the decision that corporations were not citizens.¹⁷ Whether corporations were persons or not was undecided until 1886.¹⁸ It is surprising that a decision so important and far reaching should have been rendered by the court in a summary way. The whole opinion is in less than six lines. The Chief Justice, before the case was argued, said:

"The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

No doubt the question had been thoroughly considered and discussed in the years that preceded the actual decision, and the decision was the result of matured judgment. The court looked behind the legal entity to the natural persons whose rights were involved.

THE DEFINITION OF LIBERTY.

The amendment protects persons in their life, liberty, and property. Life can hardly require definition, but the definitions of liberty and property and the limitations that may properly be imposed have been the subject of frequent adjudication. Blackstone defines the right of personal liberty as consisting in the power of locomotion, of changing situation, or moving one's person to whatever place

¹⁷ *Paul v. Virginia*, 8 Wall. (U. S.) 163 (1868).

¹⁸ *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394, 396 (1886).

one's own inclination may direct, without infringement or restraint unless by due course of law. This is obviously an imperfect definition, and even if we add to it what Blackstone includes under the right of personal security, the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation, we still fail to include some of the most valued elements of liberty as we conceive it. Mr. Justice Bradley as early as 1873¹⁹ said that the right of the citizen to follow whatever lawful employment he chose to adopt was one of his most valuable rights, which the legislature of a state could not invade whether restrained by its own constitution or not.

The freedom to choose employment, the right to work, with the allied question of freedom of contract, were suggested from time to time, and in 1897 became the subject of express adjudication.²⁰ Allgeyer, a cotton broker in New Orleans, effected a policy of marine insurance by correspondence with an insurance company in New York. The company had not complied with the law of Louisiana. Under the statute of that state the state court held the broker liable for a penalty imposed upon persons who effected for themselves or another insurance on property in the state in a marine insurance company which had not complied with its laws. The United States Supreme Court held the statute invalid because it deprived the broker of liberty without due process of law. Mr. Justice White said:

"Liberty means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto."

The later decisions have pointed out limitations upon this broad definition of liberty. The importance of the discussion is great.

¹⁹ *Slaughter House Cases*, 16 Wall. (U. S.) 36 (1872).

²⁰ *Allgeyer v. Louisiana*, 165 U. S. 578 (1897).

That case dealt only with the limitations imposed upon the states by the Fourteenth Amendment; but since the same limitation is imposed upon the federal government by the Fifth Amendment, the discussion has involved the whole power of both state and federal governments to regulate business arrangements and combinations, the hours, conditions, compensation, and terms of payment of labor, the right to work without molestation, and the regulation of contractual liability of public service corporations and of common carriers. The prohibition of pooling contracts by railroads,²¹ of contracts in violation of the Sherman Anti-Trust Act,²² of dealing in futures in stocks and grain,²³ of the transportation of lottery tickets,²⁴ of the payment in advance of seamen's wages,²⁵ are all examples of limitations upon liberty of contract. The courts have sustained state statutes prohibiting combinations of dealers,²⁶ regulating the payment of wages,²⁷ and prohibiting assignments of future earnings except under certain conditions;²⁸ as well as statutes preventing fire insurance companies from denying that the property insured is worth the amount of the insurance,²⁹ and prohibiting sales in bulk except upon notice to creditors.³⁰ A state legislature may prescribe an eight-hour day for miners;³¹ the hours during which women are allowed to work may be limited;³² and the right to restrict the ordinary liberty of contract by legislation for

²¹ *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); *United States v. Joint Traffic Association*, 171 U. S. 505 (1898).

²² *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904).

²³ *Booth v. Illinois*, 184 U. S. 425 (1902); *Otis v. Parker*, 187 U. S. 606 (1903); *Gatewood v. North Carolina*, 203 U. S. 531 (1906).

²⁴ *Lottery Case, Champion v. Ames*, 188 U. S. 321 (1903).

²⁵ *Patterson v. Bark Eudora*, 190 U. S. 169 (1903).

²⁶ *Smiley v. Kansas*, 196 U. S. 447 (1905); *National Cotton Oil Co. v. Texas*, 197 U. S. 115 (1905); *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401 (1905); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86 (1909); *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433 (1910).

²⁷ *St. Louis, Iron Mountain & St. Paul Ry. Co. v. Paul*, 173 U. S. 404 (1899); *Knoxville Iron Co. v. Harbison*, 183 U. S. 13 (1901); *McLean v. Arkansas*, 211 U. S. 539 (1909) (method of weighing coal).

²⁸ *Mutual Loan Co. v. Martell*, 222 U. S. 225 (1911).

²⁹ *Orient Ins. Co. v. Daggs*, 172 U. S. 557 (1899).

³⁰ *Lemieux v. Young*, 211 U. S. 489 (1909); *Kidd v. Musselman Grocer Co.*, 217 U. S. 461 (1910).

³¹ *Holden v. Hardy*, 169 U. S. 366 (1898).

³² *Muller v. Oregon*, 208 U. S. 412 (1908).

the protection of workmen where the legislation bears a reasonable relation to the public health, the public safety, or public morals is thoroughly established.³³ "Contracting out" of the operation of a statute may be forbidden.³⁴ Strangely enough, the court held in the famous bake-shop case³⁵ that a limitation of the hours of labor for bakers similar to that which had already been sustained in the case of miners infringed individual liberty of contract. The court, however, did not question the legal principle, but only held it inapplicable to the particular facts. The result cannot be called satisfactory.

The line of cleavage between cases on one side or the other is difficult to define, perhaps not susceptible of definition in precise and accurate language. It must be determined like most legal questions, not by definition, but by a process of inclusion and exclusion. An illustration of a case on the other side of the line is the recent decision³⁶ that Congress cannot make it a criminal offense for a carrier engaged in interstate commerce to discharge an employee simply because of his membership in a labor organization; such a statute would be an invasion of personal liberty.

Questions have arisen as to the power of Congress under the commerce clause to regulate the hours of labor in interstate railway traffic,³⁷ and to limit the right of an interstate carrier to escape the liability of a common carrier by special clauses for that purpose in its written contract with the shipper;³⁸ but it is settled that regulations of that character do not conflict with the liberty guaranteed by the Fifth Amendment. A state may require prompt settlement of claims by common carriers,³⁹ due diligence in transmitting telegrams,⁴⁰ fix the liability of a telegraph company for non-delivery

³³ *Holden v. Hardy*, 169 U. S. 366 (1898); *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549 (1911); *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911); *Second Employers' Liability Cases*, 223 U. S. 1 (1911).

³⁴ *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 (1911).

³⁵ *Lochner v. New York*, 198 U. S. 45 (1905).

³⁶ *Adair v. United States*, 208 U. S. 161 (1908).

³⁷ *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1911).

³⁸ *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186 (1911).

³⁹ *Seaboard Air Line v. Seegers*, 207 U. S. 73 (1907); *Atlantic Coast Line v. Mazursky*, 216 U. S. 122 (1910).

⁴⁰ *Western Union Tel. Co. v. James*, 162 U. S. 650 (1896).

of a message at the damages sustained by the sender,⁴¹ and prohibit contracts limiting liability for injuries made in advance of the injury received;⁴² and may provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries.⁴² Perhaps the most striking illustration of the extent to which the power of the state may go in restraint of individual liberty without violating the constitutional safeguards is the decision sustaining the compulsory vaccination act of Massachusetts in spite of the court's concession of the dangers that occasionally attend vaccination.⁴³

The general position of the court has been recently stated as follows by Mr. Justice Hughes:⁴⁴

"There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

"The right to make contracts is subject to the exercise of the powers granted to Congress for the suitable conduct of matters of national concern, as for example the regulation of commerce with foreign nations and among the several States.

"It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction."

The interpolation of the word "welfare" in addition to the words health, safety, and morals seems likely to have important results. The decision marks a recoil from the ruling in *Allgeyer v. Louisiana*.

THE DEFINITION OF PROPERTY.

Property includes, of course, tangible things, — real estate, and goods and chattels; it includes also intangible things, among which rights of action are conspicuous. With the increasing accu-

⁴¹ *Western Union Tel. Co. v. Milling Co.*, 218 U. S. 406 (1910).

⁴² *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549 (1911).

⁴³ *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

⁴⁴ *Chicago, Burlington & Quincy R. Co. v. McGuire*, 219 U. S. 549, 567, 568 (1911).

racy in the definition of property that has been made necessary by the attempt to establish just rules for the regulation of charges of public service corporations, many intangible kinds of property besides choses in action have been recognized. Claims have also been advanced to protection under the name of property that are fanciful. It has even been argued in a case ⁴⁵ that arose under the Louisiana statute requiring railway companies to provide separate accommodations for white and for colored persons, that the reputation of belonging to the white race was property. The court intimated a view to the contrary.

The good will of a business is for some purposes at least regarded as property.⁴⁶ A right to lay rails in the public streets is a property right, and the rails do not cease to belong to the owners when the franchise to run the railroad is at an end;⁴⁷ but the right to lay gas pipes gives no right to a special location, and they may be removed to another location without infringing any property right, and without compensation for the cost of removal when the change of location is necessary for the purpose of a system of drainage for the public health.⁴⁸ The right to lay rails or pipes in a public street, although it has to do with visible and tangible things, is in itself intangible, and in the nature of a license. This license may amount to a contract within the protection of the clause of the Constitution forbidding a state to impair the obligation of a contract, and is then property which may be condemned under the power of eminent domain, and for it just compensation must be made.⁴⁹ Such a contract, however, is construed strictly in favor of the public.⁵⁰ Where it is provided that the corporation may charge rates fixed by ordinance, it is held that this means by ordinance from time

⁴⁵ *Plessy v. Ferguson*, 163 U. S. 537 (1896).

⁴⁶ 20 Cyc. 1276; *Menendez v. Holt*, 128 U. S. 514 (1888).

⁴⁷ *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116 (1907).

⁴⁸ *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453 (1905).

⁴⁹ *City Ry. Co. v. Citizens' Street Railroad Co.*, 166 U. S. 557 (1897); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650 (1885); *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685 (1897); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (1898); *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368 (1902); *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517 (1904); *Cleveland v. Cleveland Electric Ry. Co.*, 201 U. S. 529 (1906); *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674 (1885); *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558 (1900).

⁵⁰ *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1906).

to time as may be deemed necessary.⁵¹ Where the contract provides that no similar privilege shall be granted to any other person or corporation, the municipality itself is not precluded from establishing its own works.⁵² But in spite of this rule of strict construction, where the city has granted an exclusive right for a certain time, the city itself is excluded from entering into competition during that time.⁵³ If a city charter so authorizes, the municipal authorities may even make a contract authorizing maximum rates which will be binding, and prevent a lowering of rates by subsequent legislation.⁵⁴

While on the one hand the definition of property has been extended by including intangible elements, on the other hand the conception has been very much limited. In a highly organized society property rights tend to become less absolute and more relative. The doctrine *sic utere tuo ut alienum non lædas* acquires a more extensive application. The law of nuisances is a striking example. Certain uses of real estate offensive to the sense of smell or hearing of normal men are restrained by law, and in time offensive sights such as billboards may come under the same condemnation. Illustrations of the relative character of property rights are to be found in the right to travel on lands adjoining a highway when the road is foundeours, a right recognized by Blackstone; and the right to destroy buildings in the path of a fire to prevent its spread, a right asserted in a famous case by the most eminent judges of New Jersey sixty years ago, but denied by the lay judges of the court of last resort, — interesting because laymen were more careful of property rights than lawyers.⁵⁵ The ordinary incidents of ownership, says Mr. Justice Holmes,⁵⁶ may be cut down by the peculiar laws and usages of the state. Land may be taken for a public levee in Louisiana without compensation,⁵⁷ and the limitation on the claim for flowage by back water under the Massachusetts Mill Act has been sustained.⁵⁸ The right to reclaim swamp lands qualifies the rights

⁵¹ Freeport Water Co. v. Freeport, 180 U. S. 587 (1901).

⁵² Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453 (1906).

⁵³ Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496 (1907).

⁵⁴ See cases above cited, notes 52-53.

⁵⁵ Hale v. Lawrence, 1 Zab. (N. J.) 714 (1848), reversing American Print Works v. Lawrence, 1 Zab. (N. J.) 248 (1847).

⁵⁶ Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 154 (1906).

⁵⁷ Eldridge v. Trezevant, 160 U. S. 452 (1896).

of individual landowners for the benefit of others.⁵⁸ The property right of railroads and public service companies is qualified, for it is subject to regulations prescribed by the state.⁵⁹ Striking instances of the qualified character of some rights of property have recently arisen out of the necessity of state regulation of the use of oil and natural gas deposits,⁶⁰ and the control of waters,⁶¹ especially subterranean waters at Saratoga.⁶² The court has gone further and held that great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of relatively small losses, without compensation, for some at least of the purposes of wholesome legislation.⁶³ Illustrations are to be found in the decision that the government may compel the removal of fences erected on a man's own land when they are so constructed by an ingenious arrangement as to enclose the government's land,⁶⁴ and in the decision sustaining the requirement of a lower fare on street railways for school children.⁶⁵

A railroad company may be required to fence its tracks,⁶⁶ to protect grade crossings,⁶⁶ to stop trains at certain stations,⁶⁷ probably to check trains at grade crossings,⁶⁸ to elevate its tracks,⁶⁹ to build viaducts and tunnels, and when necessary change their location,⁷⁰

⁵⁸ *Hagar v. Reclamation District*, 111 U. S. 701 (1884); *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9 (1885); *Wurts v. Hoagland*, 114 U. S. 606 (1885). As to arid lands, see *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896).

⁵⁹ In addition to cases above cited, see also *Louisville & Nashville R. Co. v. Kentucky*, 183 U. S. 503 (1902).

⁶⁰ *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1900).

⁶¹ *Hudson Water Co. v. McCarter*, 209 U. S. 349 (1908).

⁶² *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911).

⁶³ *Interstate Ry. Co. v. Massachusetts*, 207 U. S. 79, 87 (1907).

⁶⁴ *Camfield v. United States*, 167 U. S. 518 (1897).

⁶⁵ *Missouri Pacific R. v. Humes*, 115 U. S. 512 (1885).

⁶⁶ *Detroit, etc. Ry. v. Osborn*, 189 U. S. 383 (1903).

⁶⁷ *Gladson v. Minnesota*, 166 U. S. 427 (1897). Even where the trains are interstate trains. *Lake Shore & Michigan Southern Ry. v. Ohio*, 173 U. S. 285 (1899). Unless they are thereby compelled to turn from their direct interstate route. *Illinois Central R. Co. v. Illinois*, 163 U. S. 142 (1896). But interstate express trains cannot be required to stop when other trains are provided sufficient to accommodate the local business. *Cleveland, etc. Ry. Co. v. Illinois*, 177 U. S. 514 (1900); *Mississippi Ry. Commission v. Illinois Central R. Co.*, 203 U. S. 335 (1906); *Atlantic Coast Line v. Wharton*, 207 U. S. 328 (1907).

⁶⁸ *Southern Ry. v. King*, 217 U. S. 524 (1910).

⁶⁹ *New York & New England R. Co. v. Bristol*, 151 U. S. 556 (1894).

⁷⁰ *Chicago, Burlington & Quincy R. Co. v. Nebraska*, 170 U. S. 57 (1896); *West*

to establish stations,⁷¹ to make connections with other roads,⁷² to supply even at a loss enough trains and adequate service,⁷³ to supply local switching service⁷⁴ but not to construct private switches,⁷⁵ may be forbidden to heat its cars in a certain way,⁷⁶ and may be made liable for damage by fire.⁷⁷ Whether these requirements are justified under what is called the police power or under the right to regulate public service corporations, they constitute a serious modification of the right of private property, and their cumulative effect has been to impose vast expense upon the companies and to bring about a conception of the right of property very different from that probably entertained by the men who framed the amendment.

The greatest extension to the power of state legislation under the restrictions of the amendment is to be found in the recent decision sustaining the Oklahoma and Nebraska statutes requiring the guarantee of bank deposits. The court expressly said that it did not deny that the effect of the statute might be to take a portion of one bank's property without return to pay debts of a failing rival in business. It sustained the legislation because an ulterior public advantage might justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use, and because there might be other cases besides that of taxation in which the share of each party in the benefit of a scheme of mutual protection might be sufficient compensation for the burden it was compelled to assume. The police power, it was said, might be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and

Chicago R. Co. v. Chicago, 201 U. S. 506 (1906); Chicago, Burlington & Quincy R. Co. v. Drainage Commission, 200 U. S. 561 (1906); Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583 (1908).

⁷¹ Minneapolis & St. Louis R. Co. v. Minnesota, 193 U. S. 53 (1904).

⁷² Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1 (1907).

⁷³ Wisconsin, etc. Ry. Co. v. Jacobson, 179 U. S. 287 (1900); Atlantic Coast Line v. North Carolina Commission, 206 U. S. 1 (1907).

⁷⁴ Missouri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612 (1909).

⁷⁵ Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196 (1910); Missouri Pacific Ry. Co. v. Kansas, 216 U. S. 262 (1910). But an absolute requirement to furnish a certain number of cars at a specified day transcends the police power of the state and amounts to a burden on interstate commerce. Houston & Texas Central R. Co. v. Mayes, 201 U. S. 321 (1906).

⁷⁶ New York, New Haven & Hartford R. Co. v. New York, 165 U. S. 628 (1897).

⁷⁷ St. Louis & San Francisco Ry. Co. v. Mathews, 165 U. S. 1 (1897).

immediately necessary to the public welfare. It was, however, conceded that the use of the public credit on a large scale to help individuals in business was beyond the line.⁷⁸ A still stronger case of assertion of the public rights against the right of private property is the recent decree admitting future railroads to a joint ownership and control of the St. Louis terminals.⁷⁹

There are cases that have limited state control of public service companies; thus a carrier cannot be required to deliver cars to another and connecting carrier without adequate provision for their return,⁸⁰ nor compelled to build a switch for a grain elevator on its own right of way.⁸¹ Upon the whole the decisions lean in favor of the public, and toward the qualification of property rights.

DUE PROCESS OF LAW.

I pass by the efforts to define the meaning of the word "deprive." The distinctions are sometimes hard to follow; for instance, the distinction between flooding land by back water which deprives the owner of his property,⁸² and the construction of public improvements which cut off the access of the riparian owner to the shore⁸³ which do not.

The prohibition of the amendment is not against depriving a person of his property, but against depriving him of his property without due process of law. The implication is that he may be deprived of his property if it is by due process. He may certainly be compelled to give up a portion by way of taxes for the use of the government; to exchange his property for its value in money by virtue of condemnation proceedings under the power of eminent domain; and he holds his property subject to the exercise of the police power,⁸⁴ a subject by itself.

⁷⁸ *Noble State Bank v. Haskell*, 219 U. S. 104 (1911); *Shallenberger v. First State Bank*, 219 U. S. 114 (1911).

⁷⁹ *United States v. Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912).

⁸⁰ *Louisville & Nashville R. Co. v. Central Stock Yards*, 212 U. S. 132 (1909); *St. Louis South Western Ry. Co. v. Arkansas*, 217 U. S. 136 (1910).

⁸¹ *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196 (1910).

⁸² *Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166 (1871).

⁸³ *Gibson v. United States*, 166 U. S. 269 (1897); *Scranton v. Wheeler*, 179 U. S. 141 (1900); cf. *United States v. Lynah*, 188 U. S. 445 (1903); *Bedford v. United States*, 192 U. S. 217 (1904).

⁸⁴ *Mugler v. Kansas*, 123 U. S. 623 (1887); *Powell v. Pennsylvania*, 127 U. S. 678, 683 (1888).

That the citizen may be deprived of his property for purposes of the government by way of taxation has of course never been questioned. It is a plain and necessary limitation upon the right of property that the very government that creates, protects, and secures the right shall have the power to take some of the property for its necessary expenses. The amendment has brought about some limitations upon governmental power. It was early decided that the power of taxation could be exerted only for public purposes and not for private advantage.⁸⁶ The taxpayer seems entitled to some notice or opportunity to object to a proposed tax, but in the case of general taxes this may be the notice implied from the statute itself, of which the taxpayer may be supposed to know.⁸⁷ Special assessments for public improvements require more special notice and an opportunity for hearing,⁸⁸ including a right to support allegations by argument however brief, and if need be by proof however informal. But even special assessments for public improvements are not necessarily limited to special benefits conferred.⁸⁹ Property may be classified for purposes of taxation.⁹⁰ A special state tax on a sleeping-car company has been sustained in a case where the company was not obliged to accept intrastate business and could escape liability to the tax by ceasing the business within the state,⁹¹ but this is rather a license fee than a tax.

A state cannot tax property unless within its jurisdiction;⁹² but what is and what is not property within the jurisdiction of the state is a question of some nicety. An interstate railway or a telegraph line is in fact a unit, a whole, and its value as a unit is greater

⁸⁶ *Citizens' Savings & Loan Association v. Topeka*, 20 Wall. (U. S.) 655 (1874).

⁸⁷ *Hagar v. Reclamation District*, 111 U. S. 701 (1884).

⁸⁸ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); *Londoner v. Denver*, 210 U. S. 373 (1908).

⁸⁹ *Norwood v. Baker*, 172 U. S. 269 (1898), has been limited by *French v. Barber Asphalt Co.*, 181 U. S. 324 (1901); *King v. Portland*, 184 U. S. 61 (1902); *Chadwick v. Kelley*, 187 U. S. 540 (1903); *Schaefer v. Werling*, 188 U. S. 516 (1903); *Seattle v. Kelleher*, 195 U. S. 351 (1904).

⁹⁰ *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890); *Home Insurance Co. v. New York*, 134 U. S. 594 (1890); *Pacific Express Co. v. Seibert*, 142 U. S. 339 (1892); *Giozza v. Tiernan*, 148 U. S. 657 (1893); *Merchants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

⁹¹ *Allen v. Pullman's Palace Car Co.*, 191 U. S. 171 (1903).

⁹² *Railroad Co. v. Jackson*, 7 Wall. (U. S.) 262 (1868); *St. Louis v. The Ferry Co.*, 11 Wall. (U. S.) 423 (1870); *State Tax on Foreign Held Bonds*, 15 Wall. (U. S.) 300 (1872); *The Delaware Railroad Tax*, 18 Wall. (U. S.) 206 (1873).

than the value of the sum of its parts in the different states appraised separately. To value the line properly for the purpose of taxation, it should be valued as a unit. It is impossible under our form of government to impose taxes on the line as a unit, since part is in one state and taxable by the government of that state, and part is in another and taxable thereby. A sensible rule has been adopted by which the value of the whole has been taken, and that value has been apportioned between the states in proportion to the mileage within each state.⁹³ This rule, however, may not always be just, since a large part of the total value may be due to railway terminals situate in one state alone, and that added value may be quite out of proportion to the mileage within the state. In such a case an apportionment on the mileage basis would give another state the advantage of the value, or a part of the value, of property outside its jurisdiction. In such a case a proper allowance must be made and the apportionment according to mileage must be modified.⁹⁴ Exact justice according to mathematical standard may be impossible; all that is required is a fair approximation to equality and an avoidance of arbitrary action; the rule of reason must be followed.⁹⁵

A more difficult question has arisen out of the attempts to tax express companies by apportioning the entire value of their property, as evidenced by the value of their capital stock, among the states in proportion to the value of the property therein.⁹⁶ The result was a valuation for purposes of taxation many times in excess of the value of the tangible property; in effect the value of the franchise and the business as a going concern was distributed among the states, and states other than that of the company's domicile profited thereby. Since the earnings of an express company are for the most part compensation for services rendered, and bear but slight relation to the value of the tangible property in use, the tax is in substance a tax on the productive value of an established business and

⁹³ *Pittsburgh, etc. R. Co. v. Backus*, 154 U. S. 421 (1894); *Cleveland, etc. Ry. Co. v. Backus*, 154 U. S. 439 (1894). The same rule applies to telegraph companies, *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 (1888); *Postal Telegraph Co. v. Adams*, 155 U. S. 688 (1895); *Western Union v. Taggart*, 163 U. S. 1 (1896). And to parlor car companies, *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18 (1891).

⁹⁴ *Fargo v. Hart*, 193 U. S. 490 (1904).

⁹⁵ *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 616 (1899).

⁹⁶ *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897).

business connections. Railway cars constantly in transit may, however, be taxed on the basis of the average value within a state.⁹⁷

The condemnation of property under the right of eminent domain resembles in some respects the right to take property by taxation. It is true that in legal theory the result of a condemnation is only to transmute the character of the property and to give the property owner the value in money. He is, however, deprived of the specific property, which he may prize far beyond the money equivalent; but he is deprived of it, in case proper proceedings are taken, by due process of law as the constitutional amendment permits. Like the power of taxation, the power of eminent domain can be exercised for public purposes only.⁹⁸ While there is no specific prohibition in the federal Constitution or the amendments against taking private property for a private purpose, such a taking is held to be a taking without due process of law. It falls ultimately, therefore, upon the United States Supreme Court, in deciding whether property has been taken without due process, to decide whether the use for which it is to be condemned is a public use. Irrigation for the benefit of landowners in an arid country,⁹⁹ the enlargement of the ditch of one man to supply water for another under the conditions existing in Utah,¹⁰⁰ an aerial bucket line for transportation of ore from a mine,¹⁰¹ have recently been held to be public uses. A railroad corporation owning a majority of the stock of another railroad may be authorized by the legislature to condemn the stock of the minority.¹⁰² These decisions seem to leave little limitation on the power of condemnation except that there must be a necessity for it, the proceedings must not be arbitrary, and compensation must be made.

In the requirement of compensation, the language of the Fourteenth Amendment differs from the Fifth. The latter expressly prohibits the federal government from taking private property for public use without just compensation; the Fourteenth, although it

⁹⁷ *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18 (1891); *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70 (1899). Cf. *Union Transit Co. v. Kentucky*, 199 U. S. 194 (1905). And for the application to vessels, *Old Dominion Steamship Co. v. Virginia*, 198 U. S. 299 (1905).

⁹⁸ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896).

⁹⁹ *Fallbrook Irrigation District v. Bradley*, *supra*.

¹⁰⁰ *Clark v. Nash*, 198 U. S. 361 (1904).

¹⁰¹ *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527 (1905).

¹⁰² *Offield v. New York, New Haven & Hartford R. Co.*, 203 U. S. 372 (1906).

copies from the Fifth the clause immediately preceding against depriving a man of his property without due process of law, omits the clause requiring just compensation. This omission was once thought to be significant,¹⁰³ but it is now settled not only that the Fourteenth Amendment prevents the states from taking private property for public use without compensation, but that the United States Supreme Court will review proceedings in state tribunals in order to ascertain if the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the landowner's right to just compensation,¹⁰⁴ but will not review mere error in the administration of the law under which the proceedings were instituted.¹⁰⁵ The protection thus afforded by the federal courts to the right of private property extends to a case where the constitution of a state authorizes the taking without compensation, and the courts of the state attempt to cure the defect by inserting provisions for compensation in their judgments.¹⁰⁶

The expression "due process of law" can be traced back to the time of Edward the Third, and is said to be equivalent to the words "the law of the land" in the Great Charter of John. After the lapse of centuries, it is still impossible to define the words with such precision and accuracy that we can always say with certainty what constitutes due process of law in a particular case. There has been more litigation and consequently more discussion as to their meaning and proper application in the last forty years than in the centuries that preceded, but we are still as doubtful in many cases as Mr. Justice Miller was at the time of the decision in *Davidson v. New Orleans*.¹⁰⁷

The words must have had a different meaning in England from that we have learned to give them; since there was no thought that it was not due process of law to deprive a man of his liberty or property by a bill of attainder, or a bill of pains and penalties, or by *ex post facto* legislation, or by laws impairing the obligation of contracts; and the right to compensation for land taken for a public use depends upon acts of Parliament.¹⁰⁸ When the Fifth Amend-

¹⁰³ *Hurtado v. California*, 110 U. S. 516 (1883).

¹⁰⁴ *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 246 (1896).

¹⁰⁵ *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1897).

¹⁰⁶ *Louisville & Nashville R. Co. v. Central Stock Yards Co.*, 212 U. S. 132 (1908).

¹⁰⁷ 96 U. S. 97 (1877).

¹⁰⁸ *Randolph, Eminent Domain*, 7.

ment was framed it must have been thought that holding a man to answer for crime without the presentment of a grand jury, and taking his property for public use without compensation, were proceedings distinct from want of due process; for by the Fifth Amendment these methods are expressly condemned, and such express prohibition would have been quite unnecessary if they had been included in the prohibition against depriving a man of life, liberty, or property without due process of law contained in the same amendment. Subsequent decisions have settled that due process of law does not require an indictment by a grand jury where the state enacts otherwise,¹⁰⁹ but does require compensation for private property taken for a public use.¹¹⁰

It was not an unnatural supposition, and Lord Coke's manner of discussing the phrase lends support to the idea,¹¹¹ that due process meant process of the courts in an orderly and regular procedure. It was settled many years ago that this definition was too narrow; that the Fifth Amendment was a restraint on the legislative as well as on the executive and judicial powers of the government; and that summary procedure in an accustomed way known to the law and not arbitrary was due process.¹¹² The scope of the prohibition against taking liberty or property without due process was soon widened by judicial decision. To this movement an early decision as to the meaning of the prohibition of *ex post facto* legislation may have contributed.¹¹³ It was held that the prohibition related only to crimes. The court recognized the need for the protection of property and fundamental rights of the citizen against legislative encroachment, but rested the protection of the citizen upon rather vague and general notions of unexpressed limitation of governmental power and not upon any express constitutional provisions. The view then expressed is the foundation of the legal doctrine of vested rights, which in course of time came to be rested upon the due process clause. The theory of natural rights quite in harmony with the tendency of political thought in 1798 had prior to 1860 given way to

¹⁰⁹ *Hurtado v. California*, 110 U. S. 516 (1884).

¹¹⁰ *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226 (1897).

¹¹¹ 2 Inst. 51.

¹¹² *Murray's Lessee v. Hoboken*, 18 How. (U. S.) 272 (1855).

¹¹³ *Calder v. Bull*, 3 Dall. (U. S.) 386 (1798). See the able discussion by Edward S. Corwin, 24 HARV. L. REV. 366, 460.

an attempt at more precise definition of limitations upon legislative power resting upon the language of the Constitution; and the struggle between the doctrine of vested rights and the public necessity, between the individual and the state, that has ever since engrossed the courts, had begun.

The decision that due process of law does not necessarily mean judicial process becomes of increasing importance with the increasing complexity of administrative work and the necessity of leaving the final decision of many questions to administrative officers. The decisions of executive and administrative officers acting within powers expressly conferred by Congress are due process of law. Our immigration laws present a striking illustration.¹¹⁴ The power to exclude aliens is a power affecting international relations, and vested in the political department of the government, to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the Constitution to intervene.¹¹⁵ The jurisdictional fact in cases under the immigration acts is that the person concerned is an alien. The existence of that fundamental jurisdictional fact must be determined by some tribunal; it might have been decided that in the last resort this question was for the courts; it was, however, held that Congress has the power to commit the final decision of the question to administrative officers.¹¹⁶ The importance of the result is shown by contrast with the decisions in rate cases that the determinations of administrative bodies are subject to judicial control.¹¹⁷ The consequence is that in a probable case the right of a citizen to his liberty and to remain in the country of his birth may be finally determined by an executive officer, and even the writ of *habeas corpus* will afford him no redress. This result may have been necessary to avoid swamping the courts with numerous cases, as one of

¹¹⁴ *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892).

¹¹⁵ *Fong Yue Ting v. United States*, 149 U. S. 698, 713 (1893).

¹¹⁶ *Lem Moon Sing v. United States*, 158 U. S. 538 (1895); *Wong Wing v. United States*, 163 U. S. 228 (1896); *Fok Yung Yo v. United States*, 185 U. S. 296 (1902); *Chin Bak Kan v. United States*, 186 U. S. 193 (1902); *The Japanese Immigrant Case*, 189 U. S. 86 (1903); *Turner v. Williams*, 194 U. S. 279 (1904); *United States v. Ju Toy*, 198 U. S. 253 (1890); *Tang Tun v. Edsell*, 223 U. S. 673 (1905).

¹¹⁷ *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

the opinions suggests.¹¹⁸ No doubt much latitude must be given to executive and administrative officers in order to protect them from the hazard of private actions for damages in case a court upon fuller investigation finds they have erred in the facts. Power must reside somewhere, and whether it shall finally rest in administrative officers or in courts of justice must sometimes be determined, not with logical nicety and precision, but with a view to limitations necessary in the practical conduct of government. Ordinarily a forfeiture must be decreed by judicial proceedings, but

"where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement."¹¹⁹

Due process of law, the court has recently said, depends on circumstances. It varies with the subject matter and the necessities of the situation.¹²⁰ The governor of Colorado could not be held in damages for false imprisonment where a state of insurrection existed, and he in good faith but without sufficient reason held the plaintiff until he thought he could be safely released.

"When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."

The court might have added "*Silent leges inter arma.*"

Although in cases of necessity or great public convenience the existence of a jurisdictional fact may be finally determined without resort to the courts, there are other cases where its existence is subject to judicial review, and where the federal courts may by virtue of the due-process clause of the Fourteenth Amendment review the action of the state courts. Judicial proceedings for the sale of lands of decedents have been held void when in fact the former owner was not dead,¹²¹ but proceedings for the administration of the estates of absentees presumed to be dead have been sustained under a differently worded statute;¹²² and the absentee's title may

¹¹⁸ *United States v. Sing Tuck*, 194 U. S. 161, 170 (1904).

¹¹⁹ *Lawton v. Steele*, 152 U. S. 133, 140 (1894).

¹²⁰ *Moyer v. Peabody*, 212 U. S. 78 (1909).

¹²¹ *Scott v. McNeal*, 154 U. S. 34 (1894).

¹²² *Cunnius v. Reading School District*, 198 U. S. 458 (1905).

be barred and his property distributed without notice to him, at least when he is allowed one year within which to reclaim it.¹²³

Due process of law requires service of process within the jurisdiction of the state in order to secure a personal judgment.¹²⁴ Notice and a hearing is essential, and even in the case of a proceeding *in rem*, like the foreclosure of a mortgage, the notice must be sufficient to enable the adverse party to make a defense;¹²⁵ a notice to a resident of Virginia to appear and answer a writ in Texas in five days is insufficient. But where Congress has power to sanction a prohibition by penalties enforceable by executive officers without judicial trial on the ascertainment in a prescribed manner of certain facts, no hearing in the sense of raising an issue and tendering evidence is necessary; a penalty imposed for bringing in immigrants afflicted with loathsome and contagious diseases was sustained, although the time allowed the steamship company to produce evidence was too short to enable it to do so.¹²⁶ In fixing rates, it is not always necessary that notice should be given and a hearing afforded to the public service corporation; where the corporation has the right to question the legality and reasonableness of the rates, and the time for fixing them is regulated by statute, no specific notice is required;¹²⁷ but if the corporation has no right or opportunity to question the legality or reasonableness of the rates, the procedure is not due process.¹²⁸ In matters of general taxation the requirement of notice is even less stringent, and it is sufficient if the taxpayer has any opportunity to question the amount.¹²⁹

From the very first, attempts to bring under review in the federal courts by virtue of the due process clause alleged errors of law and fact that may have occurred in state courts or in proceedings under state authority¹³⁰ have been firmly resisted by the federal courts.

¹²³ *Blinn v. Nelson*, 222 U. S. 1 (1911).

¹²⁴ *Pennoyer v. Neff*, 95 U. S. 714 (1887).

¹²⁵ *Roller v. Holly*, 176 U. S. 398 (1900).

¹²⁶ *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909).

¹²⁷ *San Diego Land Co. v. National City*, 174 U. S. 739 (1899).

¹²⁸ *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890).

¹²⁹ *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 526 (1895); *Turpin v. Lemon*, 187 U. S. 51 (1902); *Longyear v. Toolan*, 209 U. S. 414 (1908); *Kentucky Union Co. v. Kentucky*, 219 U. S. 140 (1911).

¹³⁰ *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380 (1894). See also *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389 (1896); *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557 (1898); *Wilson v. North Carolina*, 169 U. S. 586 (1898); *Louisville & Nash-*

Where a plaintiff has the benefit of a full and fair trial in the state courts, where his rights are measured not by law made to affect him individually, but by general provisions of law applicable to all in like condition, even if he can be regarded as deprived of his property by an adverse result, the proceedings are due process of law. A landowner is not deprived of property without due process because the amount awarded to him by commissioners as the value of his land is final.¹³¹ Where the state provides adequate machinery for ascertaining compensation on notice and hearing which are availed of, and there is no ruling of the state court which prevents compensation for property actually taken, there is no lack of due process even if the amount awarded is only nominal.¹³²

A right of appeal from the decision of a state board is not essential.¹³³ Indictment by a grand jury is not indispensable.¹³⁴ Trial by jury is not a privilege of the citizen protected by the amendment.¹³⁵ A verdict may be rendered by a jury of less than twelve men.¹³⁶ The rules of evidence may be changed,¹³⁷ and it may be enacted that one fact shall be *primâ facie* evidence of another fact, provided there be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.¹³⁸ The common-law liability of a master to his servant may not only be enlarged, but the owner of a mine may be made liable for the wilful failure of the manager to furnish a reasonably safe place for the workmen.¹³⁹ The possession of policy slips by a person other than a public officer may be made presumptive evidence of possession knowingly in violation of law;¹⁴⁰ the derail-

ville R. Co. v. Schmidt, 177 U. S. 230 (1900); Hooker v. Los Angeles, 188 U. S. 314 (1903); Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30 (1904).

¹³¹ Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 (1897).

¹³² Appleby v. Buffalo, 221 U. S. 524 (1911).

¹³³ Reetz v. Michigan, 188 U. S. 505 (1903).

¹³⁴ Hurtado v. California, 110 U. S. 516 (1884).

¹³⁵ Walker v. Sauvinet, 92 U. S. 90 (1875).

¹³⁶ Maxwell v. Dow, 176 U. S. 581 (1900).

¹³⁷ Pillow v. Roberts, 13 How. (U. S.) 472, 476 (1851); Marx v. Hawthorn, 148 U. S. 172, 181 (1893); Turpin v. Lemon, 187 U. S. 51 (1902); Raitler v. Harris, 223 U. S. 437 (1912).

¹³⁸ Mobile, Jackson & Kansas City R. Co. v. Turnipseed, 219 U. S. 35 (1910); Linsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911).

¹³⁹ Wilmington Star Mining Co. v. Fulton, 205 U. S. 60 (1907).

¹⁴⁰ Adams v. New York, 192 U. S. 585 (1904).

ment of a railway car may be made *primâ facie* proof of negligence either in construction, maintenance, or operation.¹⁴¹ On the other side of the line is the recent peonage case from Alabama; the statute enacted that the refusal or failure without just cause of any person, who had entered into a contract of service, to perform the service, should be *primâ facie* evidence of an intent to defraud and punishable by fine and imprisonment; this was held to violate the constitutional amendments by establishing involuntary servitude otherwise than as a punishment for crime.¹⁴²

Efforts to induce the court to review the action of state authorities affecting the rights secured by the first ten amendments have not been successful. The decision in the Slaughter House cases in that respect has not been departed from, and most of the rights secured against federal legislation by the first ten amendments have been held to be rights of citizens of the states and not privileges and immunities belonging to them as citizens of the United States. The Fourteenth Amendment does not protect the citizen against alleged cruel and unusual punishment under state authority,¹⁴³ nor secure trial by jury in civil or criminal cases,¹⁴⁴ nor the right to bear arms,¹⁴⁵ nor immunity from prosecution except after indictment by a grand jury,¹⁴⁶ nor the right to be confronted by witnesses.¹⁴⁷ In these respects the federal Bill of Rights restricts the federal tribunals only. The Fourteenth Amendment does not subject state statutes and judicial decisions regulating procedure, evidence, and methods of trial to review by the federal courts provided the state courts have jurisdiction of the subject matter and the person, and notice and proper opportunity for hearing are given.¹⁴⁸ There are, however, some rights so fundamental in their character that a disregard of them involves want of due process of law. The right to have juries fairly chosen is one;

¹⁴¹ *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35 (1910).

¹⁴² *Bailey v. Alabama*, 219 U. S. 219, 238 (1911).

¹⁴³ *O'Neil v. Vermont*, 144 U. S. 323 (1892).

¹⁴⁴ *Walker v. Sauvinet*, 92 U. S. 90 (1875); *Maxwell v. Dow*, 176 U. S. 581 (1900).

¹⁴⁵ *Presser v. Illinois*, 116 U. S. 252 (1886).

¹⁴⁶ *Hurtado v. California*, 110 U. S. 516 (1884).

¹⁴⁷ *West v. Louisiana*, 194 U. S. 258 (1904).

¹⁴⁸ *Twining v. New Jersey*, 211 U. S. 78 (1908); at page 111 Mr. Justice Moody says that subject to these two fundamental conditions the court has sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, as consistent with due process of law, and he collects the cases.

the right to compensation for land taken for public use is another; and it has recently been contended, but without success, that the privilege against self-incrimination was of the same fundamental character.¹⁴⁸ The question whether the provision against unreasonable searches and seizures is so fundamental that adverse action by the states is prohibited by the due-process clause, has been three times expressly reserved and is not yet decided.¹⁴⁹

Penalties held *in terrorem* in the event of failure in litigation, as in the case heretofore cited, have been held to amount to a denial of due process.¹⁵⁰ To attempt by fear to dissuade the citizen from trying to enforce his rights in the judicial tribunals is hardly better than to require him in advance to agree to waive the rights given him by the federal Constitution. Much less can a state forfeit the right of a company to do business therein in case it brings suit in the federal court or removes a suit from the state court thereto.¹⁵¹

The result of the due-process clause is thus summed up by the Chief Justice in a recent case: ¹⁵² it

"does not operate to deprive the States of their lawful power and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due-process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power, since they are so unreasonable and unjust as to impair or destroy fundamental rights."

EQUAL PROTECTION OF THE LAWS.

The clause prohibiting the states from denying the equal protection of the laws is limited to persons within the jurisdiction of the state, and is therefore less extensive in its scope than the due-process clause. The words "within its jurisdiction" were inserted with an object. In the same year in which it was decided that

¹⁴⁹ *Adams v. New York*, 192 U. S. 585 (1904); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908).

¹⁵⁰ *Ex parte Young*, 209 U. S. 123 (1908).

¹⁵¹ *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910); *Pullman Co. v. Kansas*, 216 U. S. 56 (1910); *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146 (1910); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910); *Western Union Tel. Co. v. Andrews*, 216 U. S. 165 (1910); *Herndon v. Chicago, etc. Ry.*, 218 U. S. 135 (1910).

¹⁵² *American Land Co. v. Zeiss*, 219 U. S. 47, 66 (1910).

corporations were persons within the meaning of the amendment, it was held that a fire insurance company of Pennsylvania was not entitled as of constitutional right to do business in New York upon the same terms as New York companies, and that a state might impose more onerous terms upon a foreign than upon a domestic corporation, before permitting it to do business, since the foreign corporation was not within the jurisdiction until permitted to come by the action of the state.¹⁵³ Upon this rule depends the mass of legislation by the states for the control of foreign corporations. Since corporations are not citizens,¹⁵⁴ and are not persons within the jurisdiction until admitted, the control by the states is almost complete, subject to the due-process clause (which protects property, but does not prevent discriminatory legislation against corporations not amounting to a deprivation of property), and subject also to the commerce clause.¹⁵⁵ When, however, a corporation has once come into a state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, it is a person within the jurisdiction of the state, and entitled to the equal protection of the laws.¹⁵⁶ Although limited to persons within the jurisdiction of the state, the amendment applies to all within the territorial jurisdiction, without regard to differences of race, of color, or of nationality, and secures to all the protection of equal laws. It was successfully invoked for the protection of Chinese laundrymen in San Francisco against discriminating ordinances.¹⁵⁷ This clause has been invoked to limit the exercise of the police power, the power of taxation, of condemnation of private property for public use, of regulation of private business, and of labor, of methods of legal procedure, of restrictions upon freedom of contract, and the imposition of new liabilities. From the very beginning efforts have been constant and repeated to draw to the United States Supreme Court all sorts of cases under color of the claim that the appellant was deprived by the state of the equal protection of the laws. The court has, however, consistently held, as in the construction of the due-process clause, that it was not, as Justice Field

¹⁵³ *Philadelphia Fire Association v. New York*, 119 U. S. 110 (1886).

¹⁵⁴ *Paul v. Virginia*, 8 Wall. (U. S.) 168 (1868).

¹⁵⁵ *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

¹⁵⁶ *Southern Railway v. Greene*, 216 U. S. 400 (1910).

¹⁵⁷ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

expressed it, "A harbor where refuge can be found from every act of ill-advised and oppressive State legislation."¹⁵⁸ The attempt of the court to amplify the language of the amendment has, however, tended to increase the flood of litigation. In 1885 it said¹⁵⁹ that this clause of the amendment undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. So long a list of possible cases invited appeals to the federal courts for the protection supposed to be secured by the amendment. Yet in the very case in which that language was used, a municipal ordinance prohibiting washing and ironing in public laundries and wash houses within defined territorial limits, from ten o'clock at night to six in the morning, was held valid. At the same term it was held¹⁶⁰ that the ordinance was not an unwarrantable discrimination against persons engaged in the laundry business, because persons in other kinds of business were not required to cease from their labors during the same hours at night, since the risk of fire might not be so great.

At the next term¹⁶¹ the court held that an ordinance forbidding any person to carry on a laundry in a building not of brick or stone, within the city and county of San Francisco, without obtaining the consent of the supervisors, was administered by the public authorities with a mind so unequal and oppressive as to amount to a prac-

¹⁵⁸ *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (1885).

¹⁵⁹ *Barbier v. Connolly*, 113 U. S. 27, 31 (1885).

¹⁶⁰ *Soon Hing v. Crowley*, 113 U. S. 703 (1885).

¹⁶¹ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

tical denial by the state of the equal protection of the laws. It was as administered directed against Chinese only.

The three cases establish that the equal protection clause of the amendment secures all persons within the jurisdiction of the state against arbitrary laws or arbitrary administration of the law, but that laws may operate differently upon different classes, if the classification is founded upon a reasonable basis and is not arbitrary. It is enough if persons similarly situated are treated alike in privileges conferred or liabilities imposed.¹⁶² The requirement of a license which was condemned when administered with an evil eye and an unequal hand is not necessarily arbitrary, and has been since sustained.¹⁶³ The decisions since 1885 are concerned with a definition of the bounds of a proper classification. The court has leaned strongly, as it ought, toward sustaining state legislation, even when the reasonableness of the classification was doubtful. The result has been to qualify greatly the general language of the amendment, but with all the qualifications, it still remains an important safeguard of the individual against arbitrary governmental action. It secures also to citizens of different states equal rights in other states which might otherwise be beyond the protection of the constitutional provision securing to the citizens of each state the privileges and immunities of citizens in the several states. It has even been suggested recently that the federal government may be subject to a similar limitation, but on what ground is not stated.¹⁶⁴

Some illustrations of the line of cleavage between permissible classification and arbitrary classification will suffice to show the difficulty, always present in the law, of applying general language to concrete cases.

An attachment may be authorized against a non-resident defendant without requiring bond of the plaintiff, although a bond is required when an attachment is issued against a resident defendant.¹⁶⁵ In proceedings *in rem*, notice to a non-resident owner by

¹⁶² *Field v. Barber Asphalt Co.*, 194 U. S. 618, 621, 622 (1904).

¹⁶³ *Crowley v. Christensen*, 137 U. S. 86 (1890); *Gundling v. Chicago*, 177 U. S. 183 (1900); *Fischer v. St. Louis*, 194 U. S. 361 (1904); *Liebermann v. Van De Carr*, 199 U. S. 552, 560 (1905).

¹⁶⁴ *United States v. Delaware & Hudson Co.*, 213 U. S. 366 (1909); *District of Columbia v. Brooke*, 214 U. S. 138, 149 (1909).

¹⁶⁵ *Central Loan & Trust Co. v. Campbell*, 173 U. S. 84 (1899).

publication may suffice while personal service is required upon a resident owner,¹⁶⁶ since personal service may be impossible in the case of non-residents. Resident owners may be privileged to protest against a public improvement while non-resident owners may not,¹⁶⁷ since the presence within the city of the resident property owners, their direct interest in the subject matter, and their ability to protest promptly if the means employed are objectionable, place them on a distinct footing from the non-resident, whom it may be difficult to reach. It seems that criminal process may be employed against residents while civil process only is authorized against non-residents to enforce the same liability for a public improvement.¹⁶⁸ The stock of non-resident stockholders of a corporation may be assessed at its market value without deduction on account of real estate held by the corporation, while the stock of the resident stockholder is assessed at its market value, less the proportionate value of all real estate held by the corporation upon which it has already paid a tax,¹⁶⁹ provided the non-resident pays only a state tax, and the resident pays a tax to the municipality in which he resides, and the state tax imposed upon the non-resident approximates in rate the municipal tax upon residents. This case, however, is rather one in which the tax imposed is not arbitrary, than one of classification strictly speaking, and is justified as a practical effort to apportion fairly the burden of taxation between residents and non-residents.

The wider scope of the power which the state possesses over corporations and joint-stock associations¹⁷⁰ justifies legislation relating thereto which would not be justified as to individuals; a foreign corporation may be restrained from doing business in case it has done certain prohibited acts whether within or without the state, and may be compelled to produce books and papers kept outside the state on pain of a judgment by default against it.¹⁷¹ The attempt to introduce a factitious equality without regard to prac-

¹⁶⁶ *Huling v. Kaw Valley Ry. Co.*, 130 U. S. 559 (1889); *Ballard v. Hunter*, 204 U. S. 241 (1907).

¹⁶⁷ *Field v. Barber Asphalt Co.*, 194 U. S. 618 (1904).

¹⁶⁸ *District of Columbia v. Brooke*, 214 U. S. 138 (1909).

¹⁶⁹ *Travelers' Insurance Co. v. Connecticut*, 185 U. S. 364 (1902).

¹⁷⁰ Joint-stock associations may be included with corporations. *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911).

¹⁷¹ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541 (1908); *Hammond Packing Company v. Arkansas*, 212 U. S. 322 (1909).

tical differences between individuals and corporations by appealing to the Fourteenth Amendment has been checked by the court.¹⁷² The state of Tennessee made a violation of its anti-trust statute a crime, punishable in the case of natural persons by fine and imprisonment, and in the case of corporations by bill in equity and ouster. It was contended that this deprived corporations of the protection of a preliminary investigation by a grand jury, an indictment or presentment thereby, of trial by jury, and the right to have guilt established beyond a reasonable doubt. The court held that Tennessee was seeking to prevent a certain kind of conduct; the threat of fine and imprisonment was likely to be efficient for men, while the latter was impossible and the former less serious to corporations; and on the other hand ouster was likely to achieve the result with corporations but would be extravagant as applied to men; since there was thus a fundamental distinction in the evils that different delinquents might be forced to suffer, a distinction between the modes of establishing the delinquency might be justified.

Since the states may prescribe such conditions as they please for the admission of corporations of other states,¹⁷³ it follows that a distinction may be made between foreign and domestic corporations. A foreign corporation may be denied the right to participate on terms of equality with domestic creditors in the distribution of the assets of another foreign corporation, where an individual citizen of another state may not.¹⁷⁴ The permit of a foreign corporation to do business in the state may be revoked for violation of its laws against illegal combinations in restraint of trade.¹⁷⁵ But the control of the state over foreign corporations is limited by rights under the commerce clause,¹⁷⁶ and by the right to equal protection of a corporation which has entered the state in compliance with its laws and acquired property of a fixed and permanent nature.¹⁷⁷

The state may, however, go further and may make a distinction between the liabilities of different corporations. A railroad company may be made liable for double damage for injuries to cattle where

¹⁷² *Standard Oil Co. v. Tennessee*, 217 U. S. 413 (1910).

¹⁷³ *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181 (1888).

¹⁷⁴ *Blake v. McClung*, 172 U. S. 239 (1898).

¹⁷⁵ *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 (1900).

¹⁷⁶ *Western Union Tel. Co. v. Kansas*, 216 U. S. 1 (1910).

¹⁷⁷ *Southern Ry. Co. v. Greene*, 216 U. S. 400 (1910).

it fails to erect fences and cattle guards,¹⁷⁸ and may be required by statute to fence its road,¹⁷⁹ to abolish grade crossings,¹⁸⁰ to rebuild a bridge over a natural watercourse with a larger opening when that is made necessary by an increase in the volume of water resulting from lawful and reasonable regulations by public authority established from time to time for the drainage of lands along the watercourse,¹⁸¹ and may be subjected to a penalty for allowing noxious weeds to go to seed along its right of way.¹⁸² A state may abolish the fellow-servant rule as to railway employees,¹⁸³ may as to them adopt an employer's liability act¹⁸⁴ even for the benefit of employees not exposed to dangers peculiarly resulting from the operation of a railroad,¹⁸⁵ but may also, on the other hand, subject railway postal clerks to the same disabilities as an employee.¹⁸⁶ The exemption from liability for damages sustained while engaged in the construction of a new road not open to public travel or use does not make the classification bad.¹⁸⁷ A railroad company may also be made liable for damages caused by fire communicated from its locomotives,¹⁸⁸ and required to pay an attorney's fee if it unsuccessfully defends litigation.¹⁸⁹ The peculiar liabilities thus imposed upon railroads find their justification in the peculiar hazards due to their operation. Where there is no such peculiarity, the reason justifying the classifi-

¹⁷⁸ *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (1885); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26 (1889).

¹⁷⁹ *Minneapolis & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364 (1893).

¹⁸⁰ *New York & New England R. Co. v. Bristol*, 151 U. S. 556 (1894).

¹⁸¹ *Chicago, Burlington & Quincy Ry. Co. v. Drainage Commission*, 200 U. S. 561 (1906).

¹⁸² *Missouri, Kansas & Texas Ry. Co. v. May*, 194 U. S. 267 (1904).

¹⁸³ *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205 (1888); *Minneapolis & St. Louis Railway Co. v. Herrick*, 127 U. S. 210 (1888); *Chicago, Kansas & Western R. Co. v. Pontius*, 157 U. S. 209 (1895).

¹⁸⁴ *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348 (1899).

¹⁸⁵ *Louisville & Nashville R. Co. v. Melton*, 218 U. S. 36 (1910).

¹⁸⁶ *Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U. S. 35 (1910).

¹⁸⁷ *Minnesota Iron Co. v. Kline*, 199 U. S. 593 (1905).

¹⁸⁸ *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1 (1896).

¹⁸⁹ *Atchison, Topeka & Santa Fe R. Co. v. Matthews*, 174 U. S. 96 (1899). A similar rule has been sustained as to a fire insurance company. *Farmers', etc. Ins. Co. v. Dobney*, 189 U. S. 301 (1903). And life and health insurance companies. *Fidelity Mutual v. Mettler*, 185 U. S. 308 (1902). The same principle is involved in *Orient Insurance Co. v. Daggs* (valued policy statute), 172 U. S. 557 (1899); *Northwestern National Life Ins. Co. v. Riggs*, 203 U. S. 243 (1906); *Seaboard Air Line v. Seegers*, 207 U. S. 73 (1907) (penalty for failure to adjust damage claims promptly).

cation ceases; a railroad company cannot be compelled to pay an attorney's fee if defeated in an ordinary suit for debt, where no individual and no other corporation is subject to that liability.¹⁹⁰

In matters of taxation, the state may treat railroads as a class by themselves, since a railroad is a property situated in more than one taxing district, and with special characteristics that distinguish it from other property.¹⁹¹ Where property has been omitted from taxation, the state may reach backward and collect taxes, and it may collect such taxes from railroads although it does not attempt to collect them from the owners of other property.¹⁹² The regulations must proceed within reasonable limits and general usage, and must not amount to clear and hostile discriminations, especially such as are of an unusual character, unknown to the practice of our government.¹⁹³ Diversity of taxation, both with respect to the amount imposed and the species of property selected either for taxation or exemption, is not inconsistent with uniformity and equality in the proper sense of those terms, while a system that imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation.¹⁹⁴ It is hardly necessary to add that a railroad company may be compelled to bear the expenses of a state railroad commission, since those expenses result from the existence of the railroad and the exercise of its privileges.¹⁹⁵

Not only may the state legislate for the control, regulation, and

¹⁹⁰ *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150 (1897).

¹⁹¹ *Kentucky Railroad Tax Cases*, 115 U. S. 321 (1885); *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890).

¹⁹² *Florida Central, etc. Co. v. Reynolds*, 183 U. S. 471 (1902).

¹⁹³ *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232 (1890); *Columbus Southern Ry. v. Wright*, 151 U. S. 470 (1894). The rule has been applied to insurance companies, *Home Insurance Co. v. New York*, 134 U. S. 594 (1890). To telegraph companies, *Western Union Tel. Co. v. Indiana*, 165 U. S. 304 (1897). To express companies, *Adams Express Co. v. Ohio*, 165 U. S. 194 (1897); *Adams Express Co. v. Indiana*, 165 U. S. 255 (1897); *Adams Express Co. v. Kentucky*, 166 U. S. 171 (1897). To bridge companies, *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150 (1897). To banks, *Mercantants' Bank v. Pennsylvania*, 167 U. S. 461 (1897).

¹⁹⁴ *Pacific Express Co. v. Seibert*, 142 U. S. 339 (1892). And a street railway may be subjected to a special tax to which a steam railroad is not subject. *Savannah, Thunderbolt, etc. Ry. v. Savannah*, 198 U. S. 392 (1905). And a distinction in taxation may be made between a surface and a sub-surface railway. *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1 (1905).

¹⁹⁵ *Charlotte, etc. Co. v. Gibbs*, 142 U. S. 386 (1892).

taxation of railroads as a special class, but may even, where there is a reasonable basis for the distinction, legislate for one class of railroads and not for another. In an early case the court sustained a city ordinance that applied to one railroad only,¹⁹⁶ for the reason that no other person or corporation was or could be in like situation except with the consent of the city, and the ordinance, while apparently limited in its operation, applied to all who could do what it prohibited and was in effect general. There seems no reason to question that a class may have a single member, provided the distinguishing marks of the class bear a reasonable relation to the subject matter of the legislation;¹⁹⁷ in the absence of such distinguishing marks, legislation relating to a single corporation only may deprive it of the equal protection of the laws. In the *Kansas City Stock Yards* case,¹⁹⁸ legislation as to rates of charge was held bad because the statute applied to one corporation only, and the attempt to make it a class by itself because of the extent of its business was not sustained. Size may, however, in a proper case, be a good basis of classification. Proceedings for the forfeiture of large tracts of land because of the failure of the owner to have them listed for taxation have been sustained, although tracts of less than a thousand acres were exempt from forfeiture under like circumstances.¹⁹⁹ The reasonable basis for the classification was found in the fact that small tracts would probably be found in the actual occupancy of some one so that their extent or boundary could be readily ascertained for purposes of assessment and taxation; an underlying reason seems to have been the necessities of the public revenue. It is less difficult to see the reasonable basis of the classification where a statute provides for the inspection of mines only where more than five men are employed at any one time.²⁰⁰ A special occupation tax upon wholesale dealers in oil has recently been sustained as based upon a reasonable classification,²⁰¹ and special restrictions upon small

¹⁹⁶ *Railroad Company v. Richmond*, 96 U. S. 521 (1877).

¹⁹⁷ *Erb v. Morasch*, 177 U. S. 584 (1900).

¹⁹⁸ *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 114 (1901).

¹⁹⁹ *King v. Mullins*, 171 U. S. 404 (1898).

²⁰⁰ *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203 (1902); *McLean v. Arkansas*, 211 U. S. 539 (1909), sustaining a statute regulating the weighing of coal in mines where ten or more men were employed underground.

²⁰¹ *Southwestern Oil Co. v. Texas*, 217 U. S. 114 (1910). See also *Cook v. Marshall County*, 196 U. S. 261 (1908).

bankers have been sustained²⁰² upon the ground that legislation which regulates business may well make distinction depend upon the degree of evil,²⁰³ although size must be an index to the evil to be remedied if it is to form a proper basis for classification.²⁰⁴

"An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."²⁰⁵

Time alone may justify classification;

"the Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."²⁰⁶

Even the general sentiment of the community may suffice to justify regulations for the separation of white and colored persons on railway trains where there is no discrimination in the accommodations provided.²⁰⁷

Classification which may be valid for one purpose may not be for another. A special license tax upon persons carrying on the business of refining sugar and molasses and exempting planters and farmers grinding and refining their own sugar and molasses was sustained;²⁰⁸ but two years later the exemption of producers and raisers of agricultural products and live stock from the provisions of the anti-trust statute of Illinois was held to make the act void.²⁰⁹ This restriction of the power of the state is subject to some limitations; milk dealers may be singled out for special regulation under

²⁰² *Engel v. O'Malley*, 219 U. S. 128 (1911).

²⁰³ *Heath & Mulligan Mfg. Co. v. Worst*, 207 U. S. 338 (1907).

²⁰⁴ So railroads less than fifty miles long may be exempted from legislation forbidding the use of stoves on trains. *New York, New Haven & Hartford R. Co. v. New York*, 165 U. S. 628 (1897). And from the "full crew" law, *Chicago, etc. Ry. v. Arkansas*, 219 U. S. 453 (1911).

²⁰⁵ *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, 441 (1910).

²⁰⁶ *Sperry & Hutchinson v. Rhodes*, 220 U. S. 502 (1911).

²⁰⁷ *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910).

²⁰⁸ *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89 (1900). See also *Clark v. Titusville*, 184 U. S. 329 (1902) (discriminating tax on merchants); *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452 (1901) (license tax on elevators situated upon a railroad right of way, but not on those situated elsewhere).

²⁰⁹ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

the sanitary code,²¹⁰ and different prohibitions and penalties may be provided as to producing and non-producing vendors of milk,²¹¹ since these regulations bear a reasonable relation to the character of the business. Sales of stock on margin may be prohibited, although other forms of speculation are permitted;²¹² and a tax of two cents a share may be imposed on transfers of stock based on par and not on market value, although no such tax is imposed on other transfers.²¹³ The last case is interesting because it suggests a qualification —

“The general expressions of the amendment must not be allowed to upset familiar and long established methods and processes by a formal elaboration of rules which its words do not import.”

Many different circumstances justify a difference of legislation. Differences of locality for purposes of legal procedure,²¹⁴ differences of population,²¹⁵ differences in sections of a city for the purpose of building regulations,²¹⁶ peculiarities in the construction of highways with reference to liability to damage from use by cattle,²¹⁷ difference between agricultural and other land with reference to annexation to a city,²¹⁸ difference between a city and other municipalities with reference to liability for damages in case of riots,²¹⁹ differences

²¹⁰ *Lieberman v. Van De Carr*, 199 U. S. 552 (1905).

²¹¹ *St. John v. New York*, 201 U. S. 633 (1906). See also *Cox v. Texas*, 202 U. S. 446 (1906).

²¹² *Otis v. Parker*, 187 U. S. 606 (1903).

²¹³ *Hatch v. Reardon*, 204 U. S. 152 (1907). Other cases in which distinctions have been sustained are: *Williams v. Fears*, 179 U. S. 270 (1900) (an occupation tax on “emigrant agents” hiring laborers to be employed beyond the limits of the state, although the business of hiring persons to labor within the state was not subject to the tax); *Armour Packing Co. v. Lacy*, 200 U. S. 226 (1906) (license tax on meat packers, but none on those selling their products, or on those packing articles of food other than meat); *Bacon v. Walker*, 204 U. S. 311 (1907) (prohibiting the grazing of sheep under certain conditions, but not the grazing of other cattle). *Williams v. Arkansas*, 217 U. S. 79 (1910) (prohibiting drumming or soliciting on trains for certain occupations but not for others).

²¹⁴ *Missouri v. Lewis*, 101 U. S. 22 (1879); *Hayes v. Missouri*, 120 U. S. 68 (1887); *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 474 (1899); *Mallett v. North Carolina*, 181 U. S. 589 (1901).

²¹⁵ *Budd v. New York*, 143 U. S. 517 (1891) (regulation of elevator charges); *Mason v. Missouri*, 179 U. S. 328 (1900) (registration laws).

²¹⁶ *Welch v. Swasey*, 214 U. S. 91 (1909).

²¹⁷ *Jones v. Brim*, 165 U. S. 180 (1897).

²¹⁸ *Clark v. Kansas City*, 176 U. S. 114 (1900).

²¹⁹ *City of Chicago v. Sturges*, 222 U. S. 313 (1911).

in the character of articles upon some of which a representation of the flag may be placed though not on others,²²⁰ differences of age for the purpose of enforcing a law for compulsory vaccination,²²¹ difference in degrees of relationship for the purpose of inheritance taxes,²²² difference between first and old offenders,²²³ and between life prisoners and other convicts²²⁴ for the purpose of punishment and of providing for an indeterminate sentence,²²⁵ have all been held to justify differences in legislation.²²⁶

The amendment has drawn a vast mass of litigation to the federal courts, but there are few cases where state legislation has been set aside. Amid the labyrinth of decisions of which those I have cited are illustrations, the principle that has guided the court is that the object of the amendment was to prevent arbitrary action. Action is not arbitrary (1) if the discrimination is founded upon a reasonable basis, and (2) has relation to the subject matter of the legislation.²²⁷ Questions as varied as the multitude of human affairs will arise. We must continue to define, as we have for forty years, by a process of inclusion and exclusion. Whether that process shall be conducted by the slower and more considerate process of the courts where both sides are heard and the court feels obliged to vindicate its conclusions by reason, or by the sometimes hastier but not always in the end more expeditious processes of an electorate or a legislative body which may substitute its will for reason, is a question of political expediency. A lawyer naturally prefers the existing method, hitherto the boast of our American system, but must recognize that under a different system the vague provision

²²⁰ *Halter v. Nebraska*, 205 U. S. 34 (1907).

²²¹ *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

²²² *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (1898); *Billings v. Illinois*, 188 U. S. 97 (1903); *Campbell v. California*, 200 U. S. 87 (1906). The rule has recently been extended to a case of a transfer *inter vivos* creating a remainder after a life estate with a power of revocation. *Keeney v. New York*, 222 U. S. 525 (1911).

²²³ *Moore v. Missouri*, 159 U. S. 673 (1895); *McDonald v. Massachusetts*, 180 U. S. 311 (1901).

²²⁴ *Finley v. California*, 222 U. S. 28 (1911).

²²⁵ *Ughbanks v. Armstrong*, 208 U. S. 481 (1908).

²²⁶ See also *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61 (1911) (differences in manner and purpose of pumping natural mineral waters); *Provident Savings Institution v. Malone*, 221 U. S. 660 (1911) (savings bank a proper class for legislation as to unclaimed deposits).

²²⁷ *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61 (1911), and *Mutual Loan Co. v. Martell*, 222 U. S. 225 (1911), are recent expressions of the court's view.

of the Great Charter has frequently served a useful purpose in protecting personal liberty and private property. Whatever system is followed, language must continue to be defined when it becomes necessary to apply it to concrete cases.

The practical result depends not so much upon the language of the written instrument or the statutory enactment, as upon the spirit in which the language is defined and the law administered. The framers of the constitution of New Jersey in 1844 followed closely the model of the federal Constitution. They had before them the federal Bill of Rights; they omitted the due-process clause of the Fifth Amendment, although they adopted other clauses; yet it has never been suggested that either liberty or property was less cared for in New Jersey than in her sister states with their more precise constitutional guarantees; and curiously enough in the great case that arose soon after that constitution was adopted, it was the laymen in the court of last resort who were most careful of the rights of private property, and not the lawyers; the lawyers, not the laymen, recognized the paramount right of the public necessity.

Francis J. Swayze.

NEWARK, N. J.

THE LATEST PHASE OF NEGRO DISFRANCHISEMENT.

BEGINNING with Mississippi¹ in 1890, most of the southern states have passed statutes or adopted constitutional provisions, so drafted within limits which are hoped to be permissible under the United States Constitution, as, upon their face, to exclude from the right of suffrage as large a number of the negro race as possible without excluding the whites; or by fair intendment to bring about the same result by arming officers of registration and election with wide discretionary powers to that end.²

The latest provision of this character is Article 3, section 4a of the Oklahoma constitution,³ which was originally suggested as a constitutional amendment by concurrent resolution of the legislature in March, 1910, then initiated by the people and duly passed by a popular vote August 2, 1910:

"No person shall be registered as an elector of this state or be allowed to vote in any election herein unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person, who was, on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who, at that time, resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers, when electors apply for ballots to vote."

¹ For a holding by the state court that the Mississippi provision does not violate the Constitution of the United States, see *Sproule v. Fredericks*, 69 Miss. 898 (1892); *Dixon v. State*, 74 Miss. 271 (1896).

² The following are of that character: Mississippi Constitution, Article 12, secs. 241-245 (1890); South Carolina Constitution, Article 2, sec. 4 (1895); Louisiana Constitution, Article 197, secs. 1-5 (1898); North Carolina Constitution, Article 6, secs. 1-4 (1900); Alabama Constitution, Article 8, secs. 180-187 (1901); Virginia Constitution, Article 2, secs. 18-23 (1902); Georgia Constitution, Article 2, sec. 1 (1908); Acts of Maryland, 1908, c. 525.

³ Williams, Annotated Constitution and Enabling Act of Oklahoma, p. 25.

A comparison of this clause with its predecessors shows the Oklahoma amendment to be the most sweeping attempt yet made constitutionally to include all whites and exclude all blacks from the privilege of voting. It represents something of a departure from the idea contained in the "understanding" clause of the Mississippi constitution of securing the ends aimed at by lodging an arbitrary discretion in election officials, in favor of a definite classification, which itself accomplishes the purpose; although there of course remains as an ultimate resource the possibility of a hostile enforcement by the precinct election officers in case its operation should not otherwise prove sufficiently exclusionary, or in case the grandfather clause proper should be excised by the courts and the remainder of the enactment allowed to stand.

Is this latest phase of such legislation constitutional? Appeals which may possibly test its validity are now pending in the Eighth Circuit Court of Appeals in a criminal case, and in a civil case in the Supreme Court of the United States.

I.

The question arises under the following clauses of the Fourteenth and Fifteenth Amendments:

Fourteenth Amendment: "No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fifteenth Amendment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Both articles contain clauses giving Congress power to enforce them by appropriate legislation.

Under Article 1, section 2 of the United States Constitution it is further provided concerning the election of members of the House of Representatives that

"the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

Soon after the passage of the Fourteenth and Fifteenth Amendments the question arose as to whether the elector derived any part

of his right and, if so, what part from the federal government. It was held by the Supreme Court that suffrage is not a necessary incident of national citizenship,⁴ that the United States has not conferred the franchise upon any one, that it has no voters of its own creation, and that what it has conferred is merely the right to freedom from discrimination on the ground of race, color, or previous condition of servitude.⁵

In another case,⁶ the court held that the right to vote in the states comes from the states, but that the right of exemption from the prohibited discrimination comes from the United States. Before the Fifteenth Amendment was passed such discrimination could have been made and the negro race excluded, but now,

"If citizens of one race having certain qualifications are permitted to vote, those of another having the same qualifications must be."⁷

And further, it was held that it is not every wrongful refusal to receive the vote of a qualified elector at state elections that Congress can punish, but only such as are refused on account of race, color, or previous condition of servitude. Sections 3 and 4 of the Act of May 31, 1870,⁸ known as the Enforcement Act, were held invalid as not confined in their operations to unlawful discrimination on account of race. The court, however, seemed to think later that it had gone too far in entering so complete a disclaimer on the part of the nation, of federal rights in the franchise, and in *Neal v. Delaware*⁹ it held that beyond all question the amendment does have the affirmative effect of removing the word "white" from all constitutions in which it appears and so to all intents and purposes under such circumstances giving votes to the colored people; and in *Ex parte Yarbrough*¹⁰ the court seems still further intent on

⁴ *Minor v. Happersett*, 21 Wall. (U. S.) 162 (1874).

⁵ See 33 Congressional Record, 1162. In a debate in the United States Senate some years later concerning the North Carolina Constitution, Senator H. D. Money of Mississippi said, referring to the Fifteenth Amendment, "Outside of that one restriction the states can range from one end to the other of all the expedients proposed in order to restrict or enlarge their franchise in any manner that they deem best to promote their prosperity and progress."

⁶ *United States v. Cruikshank*, 92 U. S. 542 (1875).

⁷ *United States v. Reese*, 92 U. S. 214 (1875).

⁸ 16 U. S. Stat. at Large, 140.

⁹ *Neal v. Delaware*, 103 U. S. 370 (1880).

¹⁰ *Ex parte Yarbrough*, 110 U. S. 651 (1884).

modifying the language of prior decisions in this particular. The court says:

"Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of *Minor v. Happersett*, 21 Wall. 162, that 'the Constitution of the United States does not confer the right of suffrage upon any one' without reference to the connection in which it is used, insists that the voters in this case do not owe their right to vote, in any sense to that instrument. But the court was combating the argument that this right was conferred on all citizens and therefore upon women as well as men . . . the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution."

And the court says again that it does confer upon him the right to vote because it annuls the word "white," and somewhat prophetically adds that

"such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people. . . . In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right. . . . The principle . . . is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

But despite this language the Fifteenth Amendment could not have any real effect of conferring suffrage on the blacks for the reason well pointed out by John Mabry Matthews,¹¹ that even with the word "white" eliminated no negro could vote until he had first complied with other state requirements, such as the payment of poll taxes and the like, so that it still remains substantially true that suffrage comes not from the nation but from the state, and a mere general statement to the contrary in *Wiley v. Sinkler*,¹² apparently made from a supposed necessity to conserve national power, does not change the fact that the right to prescribe qualifications for electors of the most numerous branch of its legislature carries with it to the state essentially the power to grant or withhold the franchise.

¹¹ Legislative and Judicial History of the Fifteenth Amendment, by John Mabry Matthews, p. 109.

¹² *Wiley v. Sinkler*, 179 U. S. 58 (1900).

Nor is this changed or modified by Article 1, section 4, giving Congress the power to make or alter regulations as to the times, places, and manner of holding elections for senators and representatives. While this undoubtedly gives Congress paramount authority over such elections, and "it is not obliged to stand by as a passive spectator when duties are violated and outrageous frauds are committed,"¹³ yet the word "manner" has never been construed broadly enough to permit Congress to prescribe the qualifications of electors. To be sure this means that the states by failing to provide an electorate and not sending representatives might destroy the central government; but Webster admitted this to be true, and simply stated in answer that all governments could be destroyed by allowing their functions to lapse into disuse. Strictly speaking the United States can have no national electorate.

But while it is fairly well settled that suffrage does not come from the federal government, it is now also beyond controversy that the United States has full power to protect the exercise of the franchise from any act of the state tending to deny or abridge it on the ground of race. Conspiracies against voters and crimes against the franchise as such are not within federal jurisdiction; they are so only when they are committed by state agencies with state authority and when they are calculated to discriminate on account of race. The right to supervise the elections of representatives is unlimited under Article 1, section 4, but the right of the federal government under the Fifteenth Amendment at those elections is absolutely confined to the one power of seeing that discrimination does not occur on the basis of race.

Congress, therefore, has no power to deal with unofficial individuals who interfere with the franchise in purely state elections. This was first decided in *United States v. Amsden*,¹⁴ where it was held that the Fifteenth Amendment does not lay a prohibition upon private individuals.¹⁵ The leading case on this point is *James v. Bowman*,¹⁶ which established finally and firmly the doctrine that the Fifteenth Amendment relates solely to action by the United States or by any state, and does not contemplate individual acts; and it was there-

¹³ *Ex parte Siebold*, 100 U. S. 371 (1879).

¹⁴ *United States v. Amsden*, 6 Fed. 819 (1881).

¹⁵ *Lackey v. United States*, 107 Fed. 114 (C. C. A. 1901).

¹⁶ *James v. Bowman*, 190 U. S. 127 (1903).

fore held that a statute of Congress designed to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by this amendment.¹⁷ That would be an invasion of the police power of the state.¹⁸ "The power of Congress under the amendment is limited to legislation anticipatory or corrective of the discriminatory conduct of those exercising state authority."¹⁹ Unless the wrong is being done by a representative of the state no remedial power exists in Congress. But Congress has ample power even in a state or municipal election not involving the choice of federal officers to interfere for the purpose of preventing discrimination on account of race. Each of the two sources of federal authority in elections, namely, the Fifteenth Amendment and Article 1, section 4, is very broad in one respect and very narrow in another. Under the former Congress has power to do anything it sees fit to prevent discrimination on the basis prohibited; under the latter anything that it may deem wise concerning the time, place, and manner of holding federal elections except as to the place of choosing senators. But under the former Congress has no power to interfere for any other purpose than to prevent such discrimination, and under the latter no power to prescribe or in any manner affect the qualifications for suffrage.

While these two principles are well settled, yet their application is not always clear. In the matter of discrimination it is evident that each individual enactment or situation must stand by itself. But as to the second question, although the inhibition of the Fifteenth Amendment is directed only against the acts of the United States and the states, yet as these agencies must operate through individuals it becomes necessary to ascertain when an act is the act of the individual alone and when it is imputable to the state. It also becomes necessary to determine at what point the action of the state in violation of the amendment touches the complainant in such a way as to give a right of action, or touches the federal relation in such a way as to constitute the individuals committing the act criminal offenders under the United States penal statutes.

With reference to the Fifteenth Amendment, manifestly the mere passage of an unconstitutional law by the legislative author-

¹⁷ Mathews, Fifteenth Amendment, *supra*, p. 117.

¹⁸ *Karem v. United States*, 121 Fed. 250 (C. C. A. 1903).

¹⁹ Mathews, Fifteenth Amendment, *supra*, p. 112.

ity of the state, whether it be the legislature or the people as a whole acting on an initiated measure, gives a right of redress to no one, for the reason that such an act as yet is legally harmless. The rights of the individual in his personal relations are not yet invaded. Nor is he injured by a decision of a state court holding valid an unconstitutional suffrage law. His right arises, if at all, only at the moment an officer acting under such law attempts as to him to enforce it. But at this point it has been urged that, if the law is unconstitutional, it is *ab initio* void and of no effect, and therefore that a state officer acting under it is no more protected by it than if it did not exist. This is true; but when it is further contended that he is so completely without authority that his acts are merely the lawless acts of a private individual and no longer the prohibited acts of the state, we find that the strict logic of the situation cannot be maintained. The law stops short of this absurdity, for if such were true, Congress would be shorn of all power to deal with any form of violation by the state of the provisions of the Fifteenth Amendment. The acts of an executive or enforcing state officer in his official capacity for and on behalf of the state under color of an unconstitutional law are the acts of the state itself within the terms of the Fifteenth Amendment, and such officers can be reached with civil process or punished in a criminal proceeding as the only means of preventing the unlawful state action. And the same is true of all acts done by a state officer in the line of his duty which are done without color of law. While there is some confusion upon this point, and decisions are not wanting to the effect that an unconstitutional law is to be treated wholly as if it never existed,²⁰ yet by analogy with other cases it seems clear that under the Fifteenth Amendment the actions of the officers who actually reject a voter's application to register or vote are the acts of the state and may be dealt with accordingly.²¹ If it were necessary to make the state itself a party defendant instead of its officers, the injured voter would be remediless, as a state cannot without its consent be sued by a private individual.²²

²⁰ *Poindexter v. Greenhow*, 114 U. S. 270 (1884).

²¹ *Virginia v. Rives*, 100 U. S. 313 (1879); *Arrowsmith v. Harmoning*, 118 U. S. 194 (1886); *Scott v. McNeal*, 154 U. S. 34 (1894); *Ex parte Virginia*, 100 U. S. 339 (1879); *Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U. S. 226 (1897).

²² *Hans v. Louisiana*, 134 U. S. 1 (1890).

II.

James G. Blaine in his "Twenty Years in Congress" says that under the Fourteenth Amendment the states could have disfranchised the negro, and that it is only the Fifteenth Amendment which prevents. While it is probably true that under the Fourteenth Amendment alone the states could have directly discriminated *eo nomine* against the negro race in the matter of suffrage, because, except for the Fifteenth Amendment, a race distinction constitutes a legally permissible qualification, does it necessarily follow that the Oklahoma provision is not in conflict with the clause in that amendment to the effect that no state shall deny to any person within its jurisdiction the equal protection of the laws?

It is nowhere denied that notwithstanding both amendments any state may to-day deny the right to vote on account of age, sex, vocation, want of property, want of intelligence, want of character, failure to pay taxes, neglect of civic duties, vicious habits, the commission of crime, etc.²³ The equal protection of the Fourteenth Amendment does not prevent classification, and the question is, "Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished?"²⁴

Cooley²⁵ says,

"All regulations of the elective franchise must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote. If they do, they must be declared void."

And although there was no other restriction on the territory except section 1860 of the United States Revised Statutes which said that voters must be citizens of the United States, and that there must be no denial of suffrage because of race, yet the Supreme Court of Utah²⁶ decided that the territorial statute of 1878 which provided that all male voters should be taxpayers without imposing the same conditions upon the female voters, was void. The Supreme

²³ *McKay v. Campbell*, 1 Saw. 374 (1870).

²⁴ *Atchison, Topeka, and Santa Fé R. Co. v. Matthews*, 174 U. S. 96 (1899).

²⁵ Cooley, *Constitutional Law* (6 ed.), 758.

²⁶ *Lyman v. Martin*, 2 Utah (Ter.) 136.

Courts of Ohio²⁷ and Massachusetts²⁸ have held the same doctrine, although both referred to denial by statute under the state constitution rather than denial by a state constitution under the provisions of the federal Constitution. The Supreme Court of the United States adds its sanction in *Yick Wo v. Hopkins*,²⁹ wherein it says:

"It has accordingly been held generally in the States, that, whether the particular provisions of an act of legislation, establishing means for ascertaining the qualifications of those entitled to vote, and making previous registration in lists of such, a condition precedent to the exercise of the right, were or were not reasonable regulations, and accordingly valid or void, was always open to inquiry, as a judicial question."

While the above was not necessary to the decision of the case, yet when reinforced with the following *dictum* of the same court in *Pope v. Williams*³⁰ it becomes very significant:

"It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement upon or a discrimination against the individual rights of a citizen of the United States removing into the State and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other state. In such case an argument might be urged that, under the Fourteenth Amendment of the Federal Constitution, the citizen from Georgia was by the State statute deprived of the equal protection of the laws. Other extreme cases might be suggested."

This language very materially modifies and explains the language in the same case quoted by the Supreme Court of Oklahoma in *Atwater v. Hassett*,³¹

"The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one."

²⁷ *Monroe v. Collins*, 17 Oh. St. 665 (1867).

²⁸ *Capen v. Foster*, 12 Pick. (Mass.) 485 (1832).

²⁹ *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

³⁰ *Pope v. Williams*, 193 U. S. 621 (1904).

³¹ *Atwater v. Hassett*, 27 Okla. 292 (1910).

Taken together, these excerpts show that the United States Supreme Court did not mean to say that state suffrage provisions can under no circumstances contravene the equal protection clause of the Fourteenth Amendment. Willoughby in his work on the Constitution ³² also takes a similar view and suggests other cases.

It is, of course, by no means necessary that restrictive laws should operate equally upon both races. Indeed probably no such law would be mathematically equal in its application whether it be a property, educational, or other qualification, or a criminal or other disqualification. But the restrictive provision and classification must be uniform, reasonable, and impartial.

Applying these principles to the Oklahoma provision we find first a restriction in favor of former voters. In *Atwater v. Hassett* ³³ the Oklahoma Supreme Court says:

"That is a classification based upon a reason; that is, that any person who was entitled to vote under a form of government on or prior to said date is still presumed to be qualified to exercise such right."

This may be conceded to be sound, although the reasoning is much weakened when we observe that the right is given to a former voter "under any form of government." That an Indian, an Arabian, or an inhabitant of Thibet is qualified for the duties of an American voter because he once participated in some form of tribal government is not wholly convincing. But when the court adds,

"and the presumption follows as to his offspring; that is, that the virtue and intelligence of the ancestors will be imputed to his descendants just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation,"

it states a principle opposed to American tradition and ideals. Inheritance of governmental rights finds no sanction in American history or life. As the American electorate is the true ruler in this country, the adoption of the principle of inheritance in the choice of such ruler means a return to the rejected European system. But, if it be conceded that some legal ground of classification exists based upon a former right to vote or upon descent from such voter, what basis in law can be discovered for a classification which says in effect that large numbers of our own citizens who resided in Ala-

³² 1 Willoughby on the Constitution, § 238.

³³ 27 Okla. 292 (1910).

bama, Georgia, Mississippi, or other states shall not be allowed to vote, but all persons who on January 1, 1866, or at any time prior thereto, resided in some foreign nation shall have that privilege? Can it be seriously contended that residence abroad is a rational qualification for voters as against residence at home? For it must be remembered that under the clause it is not even necessary that the foreigner be one who was permitted to vote in his own country or who lived in a nation having an electorate. The Kaffirs and Hottentots and the other negroes of modern Africa themselves are not excluded under this clause, and may even transmit the right to their lineal descendants.

The authors of the Oklahoma amendment desiring to include the Oklahoma Indians, namely, the six tribes of Choctaws, Chickasaws, Cherokees, Creeks, Seminoles, and Osages, who are intelligent, and who had in 1866 a well-defined government with a form of franchise, devised the "any form of government" clause, and, in their desire to include all whites if possible, the "foreign resident" clause, with the right going to lineal descendants in both. They excluded only former non-voting residents and their descendants. These classifications are wholly arbitrary. They are not founded on any distinction referring to the suffrage itself. By no sort of reasoning can it be made to appear that residence in a foreign nation is a special qualification for voting in this, or that such non-residence is a better preparation for the franchise than residence in our own country, or that a voter is necessarily better qualified than another because he had an ancestor who voted.³⁴ The most radical features of the Oklahoma amendment are not found in the cognate legislation of any other state. It represents the extreme of this class of enactments, and is perhaps the most vulnerable to attack on constitutional grounds. While no one is verbally and literally excluded by it from the franchise, yet the educational qualification imposed is a virtual exclusion in numerous instances, and it is of course true that any abridgment of the right stands in the same category with its denial.

³⁴ Under the Maryland statute, *infra*, the terms "lawful descendant" are used; under the Oklahoma enactment the expression is "lineal descendant." The question as to the rights under the latter of the mulatto, who is able to trace his white blood back to a former voter, though not by lawful descent, might prove a very interesting one, if the constitutionality of the amendment were sustained.

It will hardly be seriously contended that an enactment requiring a property or educational qualification for all voters, but providing that the same should not apply to democrats, or masons, or those in the state residing north of the Canadian River, would be constitutional, not to speak of lineal descendants of such persons; yet such distinctions are hardly more artificial and arbitrary than the distinctions actually made. They amount to a denial of the equal protection of the laws, for it is through the instrumentality of suffrage that our greatest protection comes.

To exclude a voter merely because he was once not entitled to vote cannot surely be very reasonable and impartial in view of such language as is found in *Mills v. Green*.³⁵ Speaking of the act of South Carolina from which the court deduces the conclusion that its purport is that if a voter were not qualified to vote in 1882, he never could vote thereafter, the court says:

"The statement is appalling, the outrage stupendous, the result close to the border land that divides outrage from crime. It is not necessary to discuss it further; likely the least said about it the better."

III.

It is not, however, under the Fourteenth but under the Fifteenth Amendment that these disfranchising acts have usually been sought to be overthrown.

In *Mills v. Green* the plaintiff sought to enjoin the registrar to prevent him from denying plaintiff's right to register. On appeal to the Circuit Court of Appeals Justice Fuller held that the injunction would not lie, on the ground that equity has no jurisdiction in matters of a political nature and that "no discrimination on account of race is charged or pointed out as deducible on the face of the acts in question."³⁶ On appeal the Supreme Court held that the time of election having passed there was no subject matter before the court.³⁷ The court thus avoided passing upon the questions involved.

By far the most significant recent case is that of *Giles v. Harris*,³⁸

³⁵ *Mills v. Green*, 67 Fed. 818 (1895).

³⁶ *Green v. Mills*, 69 Fed. 852 (1895).

³⁷ *Mills v. Green*, 159 U. S. 651 (1895). See Mathews, Fifteenth Amendment, *supra*, p. 141.

³⁸ *Giles v. Harris*, 189 U. S. 475 (1903). See also *acc.* *Giles v. Teasley*, 193 U. S. 146 (1904).

which was likewise an injunction by a colored citizen of Alabama to compel the registrar to register him as a voter. The court said that it could not order the plaintiff to be registered, for that would be to confirm the very scheme which the plaintiff alleged to be a fraud upon the Constitution of the United States, and that

"if the sections of the constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration, which defeated their intent."

The court also said that equity could not undertake now any more than it had done in the past to enforce political rights, and that

"Unless we are prepared to supervise the voting in that State by officers of the court it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the United States."

The court also broadly intimates that it may not have been by accident that state constitutions are left unmentioned in section 1979 of the Revised Statutes, one of the so-called "Enforcement Acts" of the war amendments, which gives a remedy at law and in equity against any one who, under color of any state statute, ordinance, or regulation, deprives another of his constitutional rights. The court specifically expresses no opinion as to the unconstitutionality of the Alabama provision.³⁹ It contains no grandfather clause, but its vice in the view of the plaintiff was that it was to be so operated as to constitute a scheme to disfranchise the colored race.

From this case it seems clearly apparent that no relief can be expected of equity, for the reason that in addition to disclaiming jurisdiction in political matters equity considers her machinery too lame and impotent to attempt such a gigantic task as preventing the people of a state from so administering a law, fair upon its face, as to effect a fraudulent discrimination on account of race. While Justice Harlan, representing a strong minority of the court, believed this to be suitable work for an equity court, yet the majority

³⁹ 17 HARV. L. REV. 130. The writer of the note thinks that no constitutional question was decided by *Giles v. Harris*.

thought it to be political in its nature and only to be handled properly by the political department of the government. And, if the court should ultimately hold squarely that section 1979 of the Revised Statutes is fatally defective in the particular above mentioned, it would not only leave a plaintiff without a remedy in either law or equity in case the objectionable franchise provisions were found in a state constitution, but it would likewise make it impossible to punish registrars criminally, since section 5510 of the Revised Statutes, the penal statute, also omits the word state "constitution," and there is no other congressional legislation fully covering the same matters. These statutes, however, both contain the word "regulation," which seems broad enough to include every form of state enactment.

In *Jones v. Montague*⁴⁰ a petition was presented asking for a writ of prohibition to prevent the canvass of the votes cast at a congressional election upon the ground that petitioners had in violation of the federal Constitution been denied registration. The court refuses to review the dismissal of the petition for the reason that the canvass had already been made and the House of Representatives had recognized the holders of the certificates; and therefore no relief being possible the case was dismissed as a mere moot case.

A case somewhat confidently relied on by advocates of the modern grandfather clause is *Williams v. Mississippi*,⁴¹ wherein an indicted negro, a citizen of Mississippi, objected to the grand jury of white men who indicted him, on the ground that jurors must be electors, and electors must be able to read and write, and that registration officers are given arbitrary power in determining their qualifications. In commenting on the following language in the case of *Yick Wo v. Hopkins*, namely

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution,"

⁴⁰ *Jones v. Montague*, 194 U. S. 147 (1904).

⁴¹ *Williams v. Mississippi*, 170 U. S. 213 (1898).

the court says:

"This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them. . . . That amendment [the Fourteenth] and its effect upon the colored race have been considered by this court in a number of cases, and it has been uniformly held that the Constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discrimination by the general government or by the States against any citizen because of his race."

The decision is not applicable to the Oklahoma situation, where it is not claimed there has been evil administration, for the reason that the Mississippi Constitution contains no grandfather clause or other classification of any character that could be said to be arbitrary *per se* or even to lack impartiality. A mere property or educational qualification uniformly applicable to all is legally unobjectionable. Even its "understanding" clause is of uniform application on its face, and therefore not objectionable apart from its unequal administration. Indeed "good character" as a qualification of voters has long been a legal prerequisite in several of the northern states, and no serious legal objection has ever been made to it on the ground that it lodged an unconstitutional and arbitrary discretion in the hands of the officers of election. There is no presumption that such officers will exercise it unequally.

But can it be said that the Oklahoma amendment does not upon its face discriminate on account of race, color, or previous condition of servitude? Does it not, when taken by its four corners, manifest an emphatic intention to do the exact thing forbidden by the Fifteenth Amendment, but to do it by the use of other language and of different modes of expression? If there can be any doubt of this intention, debates on such provisions are a legitimate method of throwing light upon it just as Elliott's Debates are in interpreting the Constitution. Debates in the Oklahoma legislature which suggested the measure are not available, but those of the Louisiana constitutional convention on the Louisiana provision, which Oklahoma followed to a considerable extent, are available, and these show clearly, unmistakably, and without reserve an intention to thwart the Fifteenth Amendment and to deny suffrage to the

negro because he is a negro.⁴² But is not the language itself discriminatory? Does it not fairly labor to give an accurate description of the negroes as the class of excluded persons by the use of language describing them as a race, by reciting historical incidents, and by phrases descriptive of practically all other persons but not applying to them? And where the intent and meaning of language are so clear, is not the substance to be looked at rather than the form, and is it not a trespass upon the dignity of a court to expect it to refuse to brush aside so thin a gauze of words? ⁴³

To be sure, as the court points out in *Atwater v. Hassett*,⁴⁴ which sustains the validity of the Oklahoma amendment, a few blanket Indians not belonging to any of the leading tribes are excluded. And the court states that some resident alien whites, who on January 1, 1866, had not declared their intention to become citizens and some who came from other states, where prior to 1866 they were not allowed to vote because of property or other qualifications, are also excluded. But that can be true only provided they never had an ancestor, however remote, who could vote here or elsewhere. Such cases are rare. A few free negroes possessing the franchise before 1866, and likewise such as may have been residing in Africa in 1866 and their descendants, are not excluded; but could it be successfully contended that, for instance, a provision that all former slaves and all poor or illiterate whites should be denied the

⁴² The following extracts are from "The Suffrage Clause in the New Constitution of Louisiana," by Amasa M. Eaton, 13 HARV. L. REV. 279.

Lieutenant-Governor Snyder: "I am in favor of the proposition that every white man shall vote because he is white, and no black man shall vote because he is black. We cannot put in these words, but we can attain that result."

President Kruttschnitt: "Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?" (Applause.)

Mr. Sanders: "We are here to write in the organic law of Louisiana that the white men shall always rule this state." (Applause.)

Mr. Boatner: "Will Mr. Breazeale permit me to suggest that the committee was seeking in this, in a general way, the exclusion of all the negroes and the inclusion of the whites."

Judge Semmes: "We proclaimed at least in my part of the state that we were coming to establish the ascendancy of the white race, and to see to it that no white man should be disfranchised."

⁴³ In the debates in the Louisiana constitutional convention Judge Coco called the Louisiana provision a "weak and transparent subterfuge."

⁴⁴ 27 Okla. 292 (1910).

right of suffrage was not a discrimination against the negro race on account of race? It is no less a doing of the thing prohibited that something else is also done. As was well pointed out by Senator Pritchard⁴⁵ of North Carolina on the floor of the United States Senate, a description of a part of our citizens as not entitled to vote at a period immediately after the war is a good description of those who were in a previous condition of servitude, for no slave was ever allowed to vote. And, if a discrimination is made "on account of" race, color, or previous condition of servitude, it is immaterial what language is used to convey such a meaning.

The only other case besides *Atwater v. Hassett* where the constitutionality of a genuine grandfather clause has been passed upon is *Anderson v. Myers*.⁴⁶ There were three suits, which were for damages against the registers of election. The statute⁴⁷ resembles somewhat closely the Oklahoma enactment. The opinion of the court says:

"It is true that the words 'race' and 'color' are not used in the statute of Maryland; but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention, and effect of the law, and not its phraseology, which is important. No possible meaning for this provision has been suggested except the discrimination which by it is plainly indicated. . . . But looking at the Constitution and laws of Maryland prior to January 1, 1868, how can it be said with any show of reason that any but white men could vote then? And how can the court close its eyes to the obvious fact that it is for that reason solely that the test is inserted in the Maryland Act of 1908, and is not the court to take notice of the fact that during all the forty years since the adoption of the fifteenth amendment colored men have been

⁴⁵ 33 Constitutional Record, 1027.

⁴⁶ *Anderson v. Myers*, 182 Fed. 223 (C. C., Dist. Maryland, 1910). Constitutionality was assumed, but no reasons given, with reference to the North Carolina provision in *Clark v. Statesville*, 139 N. C. 490 (1905), and with reference to the Oklahoma provision in *Ex parte Shaw*, 4 Okla. Cr. 416 (1910).

⁴⁷ Acts, Md., 1908, c. 525, prescribing the qualifications of voters at municipal elections in the city of Annapolis, declares that the registrar shall register all male citizens of twenty-one years or over, not convicted of crime, and assessed on the city tax books for at least \$500, also all duly naturalized male citizens twenty-one years of age, all citizens who prior to January 1, 1868, were entitled to vote in Maryland or any other state at a state election, and all lawful male descendants of the latter, and provides that no person not coming within one of the enumerated classes shall be registered as a legal voter in the city or be qualified to vote at any municipal election held therein.

allowed to register and vote in Maryland until the enactment of the Maryland statute of 1908? . . . It was primarily the right of suffrage and its protection as against any discriminatory legislation of the states, which was the subject matter dealt with by the fifteenth amendment and the Revised Statutes; and considering the purpose of the law it does not seem that any other construction can be defensible."

This decision seems sound, and it is believed that, if the Oklahoma case reaches the Supreme Court of the United States in a form that demands a decision on the constitutionality of the act, which is doubtful in view of the situation hereafter pointed out and in view of the avoidance of a decision by that tribunal thus far, it will be held invalid.⁴⁸ Unfortunately no facts are given in the Oklahoma case, and it is therefore impossible to know whether the same obstacles will be encountered as in *Giles v. Harris*. The court at least will not decline the exercise of its jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of its judgment.⁴⁹

IV.

If grandfather clauses are unconstitutional, what is the remedy? Granting that the intimation of Justice Holmes in *Giles v. Harris*, that the federal statutes giving civil and penal causes of action when the constitutional rights of citizens are unlawfully invaded, are defective because of the omission in the enumeration of forbidden enactments to mention a state constitution, would not be insisted upon as fatal in view of the use of the broad term "regulation," then the situation in the courts is as follows:

1. The injured plaintiff might sue the offending representative of the state for damages. This is utterly inadequate, as it does not protect him in his right to vote; and before a hostile judge and jury

⁴⁸ "If the North Carolina and Louisiana forms of the grandfather clause shall come before the Supreme Court of the United States in such a way as to make it the right and duty of that court to pass upon their validity, I personally believe that they will be held invalid." *American Political Science Review*, Vol. 1, p. 20, "Negro Suffrage," by J. C. Rose. These are the two states which prior to Oklahoma had typical constitutional grandfather clauses. The similar Maryland provision limited to a municipality was statutory. Some years ago the voters of Maryland defeated the most radical educational provision ever proposed.

⁴⁹ *McPherson v. Blacker*, 146 U. S. 1 (1892).

of the locality, the judgment, if favorable at all, would probably be for a nominal sum.

2. A criminal prosecution may be instituted. This does no direct good to the injured party, and is even more likely to terminate unsuccessfully because of local prejudice and feeling. These cannot be avoided even when the trial takes place in the federal courts, where jurors will still be subjected to the local atmosphere of hostility to the plaintiff and his race.

3. If relief is sought in equity to compel state officers to register or receive his vote, we have found that the time for the granting of the relief of the bill will have passed in most instances before it can be reached by the court, and that equity is reluctant to endeavor to enforce political rights, and also considers her machinery inadequate for the immense and complicated task of seeing to it that registration and elections, national and state, are carried on without fraudulent discrimination on account of race.

It is doubtful, therefore, if anything adequate can be done in the courts. It is another example of the truth often clearly observable in the history of English law that the remedy lags behind the right in spite of the familiar maxim to the contrary.

What can be done in the political department of the government?

1. Congress might take entire charge of federal elections, appointing its own registrars and its own officers of election.

2. Congress might strengthen its present penal statutes by providing severe penalties for all state officials who in state registrations or elections deny to any person the equal protection of the laws in respect to suffrage, or deny or abridge his right on account of race. It is not perfectly clear at the present time that the enforcement statutes now in effect are sufficient for this purpose. Mr. Rose is of the opinion that they are not.⁵⁰ A number of such statutes have been declared unconstitutional, and those remaining are of doubtful scope. However, it is not entirely apparent how an officer could be made punishable for refusing to register a voter under a wholly unconstitutional law, or even for refusing to permit him to vote. The same difficulty is met here as that which Judge Holmes says in *Giles v. Harris* is encountered in equity. If the law is invalid, it gives no one a right to vote. Perhaps, if it were con-

⁵⁰ American Political Science Review, Vol. I, p. 34.

tained in a state constitution the state would be left without a suffrage law, but how can the officer be reached for punishment? And, on the other hand, if only part of the enactment should be held unconstitutional, namely, the discriminatory phrases, and the main requirement of educational qualification which is admittedly competent should be allowed to stand as valid, then there is ordinarily nothing to punish, for the black, being unable to qualify under such circumstances, is denied no right by being refused the privilege of voting. Possibly Congress might meet this situation by enacting that, if any one is allowed to vote under state sanction, it shall be penal for any state officer to exclude or discriminate against the black because of his race.

3. Congress might empower federal courts of equity to take charge on the complaint of the party aggrieved, and might make it their duty to do so, thus enlarging the scope of clause 16 of section 629,⁵¹ which gives original jurisdiction to the federal circuit courts in such cases.

4. Congress might cut down the representation of the southern states in the lower house.

5. The Fifteenth Amendment might be repealed.⁵²

As to all of these it is evident that Congress contemplates no such action. In House Reports No. 1740, 58th Congress, 2d session, p. 3, it is said:

"However desirable it may be for a legislative body to retain control of the decisions as to the election and qualifications of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies. We have in this country a proper forum for the decision of constitutional and other judicial questions. If any citizen of South Carolina is now deprived [of his right to vote] by the provision of the present constitution he has a right . . . to bring suit in a proper court for the purpose of enforcing his right or recovering damages for its denial."

Congress thus pushes the shuttle back to the courts. Neither seems inclined to take jurisdiction, for the perhaps unconscious

⁵¹ U. S. Comp. Stat., 1901, p. 506.

⁵² Arthur W. Machen, Jr., in an article in 23 HARV. L. REV. 169, maintains that the Fifteenth Amendment is void. See an argument *contra* by William C. Coleman in 10 Col. L. Rev. 416.

but nevertheless apparent reason that public sentiment in neither the north nor the south would sustain a policy of radical enforcement. Public sentiment in the north is apathetic, while in the south the racial feeling is so powerful that endless new expedients would be resorted to in order to maintain the supremacy of the white race.⁵³ The very federal officers themselves sent in to attend to enforcement would soon partake of this feeling. Such a policy would engender most damaging sectional bitterness, and would greatly check the development of the new and broader sentiments of nationality, which have been rapidly growing in the south during the last few years. The people of the northern states have become convinced that they do not understand the negro problem, and that it should be left to the southern states to work out as they may deem wise. On the other hand, an attempt to repeal the Fifteenth Amendment would be utterly idle. The northern states are willing to be passive, but would resent with all their strength the principle of a repeal. It is not an inspiring spectacle to see a portion of the organic law of the land rendered nugatory by apathetic assent, and it is not calculated to inspire respect for constitutions. It is only another illustration of the practical death of legislation when it ceases to respond to imperative sociological demands; nor is this condition the less apparent because the nation is not in a mood for verbal repeal. The southern states are making the most of a bad situation. They have no desire to show disrespect for the Constitution, but on the other hand cannot be expected, without strenuous effort to discover methods of correction, to accept intolerable conditions. The north is making no move toward any change, and matters are likely to drag on indefinitely in their present state of legal uncertainty.

Whether the Fifteenth Amendment was ever necessary to protect a race newly born to civil rights, it must be apparent even to a casual observer of southern affairs at the present time that a

⁵³ The writer of a note in 24 HARV. L. REV. 388 thinks that where a clause exempts from the stricter requirements soldiers and sailors and their descendants it is clearly not contrary to the Fifteenth Amendment, a classification on that basis having been heretofore regarded as a legitimate one. This is the plan followed by Virginia and Alabama, and doubtless some such plan will be followed by other southern states in case the more radical enactments shall prove to have transgressed constitutional limitations.

persistent attempt to enforce it fully in the light of its initial conception would be little less than a national calamity.⁵⁴

Julien C. Monnet.

THE STATE UNIVERSITY OF OKLAHOMA.

⁵⁴ The southern viewpoint is well shown by the remarks of Senator John T. Morgan of Alabama on the floor of the Senate in January, 1900. 33 Constitutional Record, 671 *et seq.* Speaking of the North Carolina suffrage provision he said: "In physical, mental, social, inventive, religious, and ruling power the African race holds the lowest place, . . . and it is no idle boast that the white race holds the highest place. To force this lowest stratum into a position of equality with the highest is only to clog the progress of all mankind in its march . . . toward the highest planes of human aspiration. . . . It is a vain effort and is fatal to the spirit and success of free government to attempt to use its true principles as a means of disturbance of the natural conditions of the races of the human family and to reestablish them on the mere theoretical basis, which is not true, that in political power all men must be equal in order to secure the greatest happiness to the greatest number. . . . No great body of white people in the world could be expected to quietly accept a situation so distressing and demoralizing as is created by negro suffrage in the south. It is a thorn in the flesh, and will irritate and rankle in the body politic until it is removed as a factor in government. It has been one unbroken line of political, social, and industrial obstruction to progress and a constant disturbance of the peace in a vast region of the United States. . . . The people of the south are justified, and it would be inexcusable if they failed, by every constitutional measure in their power to preserve in their own hands the power of government in their own states, they being responsible for their welfare, their education, their business interests, and the interests of civilization."

GENERAL POWERS AND THE RULE AGAINST PERPETUITIES.

PROFESSOR GRAY thus states the general rule: "If a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad."¹

To this, however, there is an exception: if within lives in being and twenty-one years from the time of the creation of the power there must come into the hands of the donee a right to exercise a general power to appoint by deed or will, the power is valid in its creation, although the donee may not exercise it within the time required by the rule.

Thus, if in a marriage settlement there be given to the unborn child of the marriage a general power to appoint by deed or will, it is clear that within lives in being at the date of the settlement and twenty-one years thereafter the power will come into the hands of one who may exercise it. But the actual exercise of the power may not occur until the end of lives not in being at the time of the settlement. The power, however, is valid in its creation, for within the proper time the donee has become completely *dominus* of the property, because he can appoint to himself. Such is the holding of *Bray v. Bree*.²

If, however, the marriage settlement conferred a general power on the unborn daughter of the marriage to appoint by deed or will, but required that such appointment should take effect only after the marriage of the daughter, there would be a condition precedent to the exercise of the power that the daughter must marry. She, therefore, would not become *dominus* of the property until that event had occurred, and the power, therefore, is void in its inception. That is *Louisa's* case in *Morgan v. Gronow*.³

In the same way, if the marriage settlement confers a general power upon the unborn children of the marriage to appoint by will only, the power cannot be exercised till the child dies. Then only

¹ Gray, Rule against Perpetuities, 2 ed., § 473.

² 2 Cl. & F. 453; 8 Bligh, N. S., 568 (1834).

³ L. R. 16 Eq. 1 (1873).

can the donee possibly become *dominus* of the property. That time is too remote. Hence the power is void in its inception. This is precisely the holding of *Wollaston v. King*⁴ and *Tredennick v. Tredennick*.⁵

Suppose, however, that the power as created must be exercised, if at all, within lives in being and twenty-one years from the date of the creation of the power, so that the power is valid in its inception. Thus, suppose A. by his own ante-nuptial settlement or by the will of X. has a power to appoint among his issue and appoints by will to his daughter for life and then to such children of his daughter as reach twenty-one. Here A.'s power is valid in its inception because it must be exercised within lives in being at its creation, *i. e.*, within A.'s life. The remoteness, however, of an appointment made pursuant to such a power depends, according to Mr. Gray, on "its distance from the creation and not from the exercise of the power."⁶ Hence the ultimate interest appointed to the grandchildren of A. who reach twenty-one is void.

Suppose, however, that A.'s power, instead of being a special power to appoint to his issue, is a general power to appoint by deed or will. Here it is held that the validity of the exercise of the power depends not on the distance of the interest appointed from the creation of the power, but on the distance of such interest from the time of the exercise of the power.⁷ Why? Because it is said that at the time of appointment the donee is *dominus* of the property. "He has the absolute control over it. He can deal with the property as if he owned it in fee. . . . The appointment can be considered an appointment to the donee himself and then a settlement of his own property."⁸ In short, the courts look at the substance of the situation and not the form. If the donee is at the time of appointment in all respects in a position like that of the absolute owner, then the validity of his act, so far as the question of

⁴ L. R. 8 Eq. 165 (1869).

⁵ [1900] 1 I. R. 354. On the other hand, in 3 Dav. Prec. Conv., 3 ed., 156, note, it is said that until *Wollaston v. King*, *supra*, an appointment such as was made in that case would have been considered not too remote on the ground that the general power of appointment (whether exercisable by deed or will, or will only) is in substance part of the interest (a life estate) limited to the object of the said power (the life tenant).

⁶ Gray, *Rule against Perpetuities*, 2 ed., § 473.

⁷ *Id.*, § 524, and authorities there cited.

⁸ *Id.*, § 524.

remoteness is concerned, is to be determined with reference to the time of the appointment.

Suppose now that the power given to A. in the case last put was a power to appoint by will only, and was as general as such a power could possibly be. Can A. by will appoint to trustees for his daughter's life and then upon trust for such children of the daughter as reach twenty-one? Is the appointment to the grandchildren valid?

Observe that there is no question whatever of the validity of the power in its creation. The power is valid to start with, for it must be exercised in lives in being at the date of its creation. The only question is whether in determining the validity of the exercise of the power the remoteness of the limitations created is to depend upon the time when the power was created or when it was exercised. If the former view be adopted the appointment to A's grandchildren is too remote. If the latter is correct then the gift to the grandchildren is valid. It is conceded that the position which may properly be taken depends upon whether at the time of appointment the donee is in substance, or practically, the owner.

Mr. Gray⁹ insists that the donee is not "practically the owner; he cannot appoint to himself; he is, indeed, the only person to whom he cannot possibly appoint, for he must die before the transfer of the property can take place." When Mr. Gray says the donee cannot appoint to himself so as to enjoy the property during his life, we must agree with him. It follows inevitably that during the life of the donee he is not practically the owner. If this is what Mr. Gray means when he says that the donee is not "practically the owner," all must agree. But is that the important inquiry? Is it not essential to determine whether *at the moment of exercising* the general power the donee is practically the owner? For instance, if a donee were given a general power to appoint by deed or will when he reached thirty or married, it would be stupid to say that he was not practically the owner before he reached thirty or married, and, therefore, could not be practically the owner when he reached that age or married. In the same way it will not do to say that because a donee is not practically the owner before his death, he cannot be practically the owner at the moment of his

⁹ Gray, Rule against Perpetuities, 2 ed., § 526 b.

death. In short, our real inquiry must be, is the donee with a general power to appoint by will only practically the owner at the moment of his death?

How is one to determine whether at a particular time the donee of a general power is practically the owner? The natural test would seem to be, can he do everything with reference to the property which is subject to the power that he could do if he were the owner? Thus, if the donee have a general power to appoint by deed or will at thirty, we say he can do everything at thirty with reference to the property subject to the power that he could do if he were the owner. In the same way when the donee has a general power to appoint by will only, we determine whether he is practically the owner at the moment of death by asking whether he can do everything with reference to the property subject to the power that he could do if he were the owner. We do not need to ask whether he can enjoy the property personally, because we know that no owner of property can at the moment of death enjoy it personally. His entire right of ownership consists in the power to dispose of it.

What, then, is there that an owner of property can do in the way of disposing of his property at the moment of his death which the donee of a general power to appoint by will cannot accomplish? Nothing! *Ergo*, the donee of a general power to appoint by will, if that power be valid in its inception, is, at the moment when he may exercise the power, practically the owner.¹⁰ *Rous v. Jackson*,¹¹ *In re Flower*,¹² and *Stuart v. Babington*,¹³ which proceed upon this premise and hold the power in A to appoint by will to have been well exercised when A appoints to his daughter for life and then to such of her children as reach twenty-one, are correct on principle. The direct repudiation in each of the contrary result reached in *Powell's Trusts*¹⁴ should be approved. Mr. Gray's attempt to sustain *Powell's Trusts* on principle cannot be regarded as successful.

¹⁰ It does not really add anything to the weight of the argument that one having a general power to appoint by will, while he cannot appoint to himself, can appoint to his estate, and the question whether there is a lapsed devise or bequest under the donee's will or the property subject to the power goes in default of appointment, depends upon whether the donee has appointed to his estate first and then devised his own property, or has appointed direct to the objects of appointment. *Chamberlain v. Hutchinson*, 22 Beav. 444 (1856); *In re Davies' Trusts*, L. R. 13 Eq. 163 (1871).

¹¹ 29 Ch. D. 521 (1885).

¹² 55 L. J. Ch. 200 (1885).

¹³ 27 L. R. Ir. 551 (1891).

¹⁴ 39 L. J. Ch. 188 (1869).

Mr. Gray, however, not only attempts to support Powell's Trusts on the ground that it is sound upon principle, but he asserts that "the weight of authority seems to be with Powell's Trusts."¹⁵ But opposed to Powell's Trusts are the three later English cases above referred to, in terms repudiating it.¹⁶

Mr. Gray, however, insists that in support of *In re* Powell's Trusts there are three English and two American cases. He says: "Wollaston *v.* King, Morgan *v.* Gronow and the other cases cited in note 2 to the preceding section [*i. e.*, Tredennick *v.* Tredennick, Genet *v.* Hunt,¹⁷ and Lawrence's Estate¹⁸] stand together with Powell's Trusts in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power, in opposition to Rous *v.* Jackson."

The New York case of Genet *v.* Hunt may be in point in support of Powell's Trusts. There a marriage settlement provided for the wife for life with a power in her to appoint by will to any one, and in default of appointment to her heirs. She appointed to her children for life and then to their heirs. If the limitations appointed were measured from the date of the settlement the New York statute was violated, because the absolute power of alienation was suspended for three lives, including the lives of the children of the marriage, who were not *in esse* at the time their interests were created. The court in adopting the view of Powell's Trusts paid tribute to the powerful influence which Mr. Gray's views have had. They seem to have followed Powell's Trusts only because Mr. Gray said they ought to. In the Pennsylvania case of Lawrence's Estate the limitations created in the exercise of the power were valid even though the view of Powell's Trusts was adopted. The court, however, also paid tribute to the influence of Mr. Gray's views by announcing their preference for the rule of Powell's Trusts, apparently because Mr. Gray told them that that was the better view.

Clearly, however, Mr. Gray sets his chief reliance for the support of Powell's Trusts upon the English cases, namely, Wollaston *v.* King, Tredennick *v.* Tredennick, and Morgan *v.* Gronow. In these

¹⁵ Gray, Rule against Perpetuities, 2 ed., § 526 b.

¹⁶ Rous *v.* Jackson, 29 Ch. D. 521 (1885); *In re* Flower, 55 L. J. Ch. 200 (1885); Stuart *v.* Babington, 27 Ir. L. R. 551 (1891).

¹⁷ 113 N. Y. 158, 21 N. E. 91 (1889).

¹⁸ 136 Pa. 354, 20 Atl. 521 (1890).

cases the question was as to the validity of the power in its inception. In *Wollaston v. King* and *Tredennick v. Tredennick* the general power was given by a marriage settlement to the unborn child of the marriage, to be exercised by will only. The fact that it was a general power or that the donee became *dominus* of the property or practically the owner at the time of his death was immaterial, for that did not happen soon enough. The time was so late that the power was void in its inception. In *Morgan v. Gronow* the situation was the same except that the general power was given by a marriage settlement to an unborn daughter of the marriage to be exercised upon her marriage by deed or will. Here the donee when she married could exercise the power by deed or will, yet the power was void for remoteness in its inception because the marriage of the daughter might happen at too remote a time. The principle applicable is the same as that acted upon in *Wollaston v. King*.

To declare, as Mr. Gray does, that *Wollaston v. King*, *Tredennick v. Tredennick*, and *Morgan v. Gronow* "stand together with *Powell's Trusts* in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power" is to confound two entirely different situations — one where the question is as to the original validity of the power at the time of its creation; the other where the power is valid when created but where the question is, has it been validly exercised? In the first case the fact that the power conferred upon an unborn person is a general power to appoint by deed or will may cause it to be validly created because the donee will have a complete right to exercise it at the commencement of his life, or at least when he is twenty-one, and at that time — which is not too remote — he will become practically the owner. On the other hand, if he were given the power to appoint by will only, he could not possibly exercise the power till he died. He could not possibly become "practically the owner" till then. Hence the power is void in its inception. In the second case, the fact that a general power to appoint by deed or will is conferred which is valid, causes the validity of the limitations created in the exercise of the valid power to depend on their remoteness from the date of the execution of the power. This is because the donee is practically the owner *at the date of the exercise of the power*. The donee is equally the *dominus* or practically the owner at the date of the exercise of a general power to appoint by will

only, because at that time he can do all that any owner can do with his property upon a similar occasion.

In short, the fact that a power is a general power to appoint by deed or will or a general power to appoint by will only has an entirely different significance, depending upon whether you are considering the validity of the power in its inception or the validity of the exercise of a power admittedly valid in its inception.

Albert M. Kales.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM. 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President*.
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
PRESCOTT W. COOKINGHAM,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer*.
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,
FRANCIS S. WYNER,

THE LAW SCHOOL. — Mr. Austin Wakeman Scott, A.B., LL.B. 1909, who during the past year has been Dean of the College of Law of the State University of Iowa, has returned to his position as Assistant Professor of Law in this Law School. His return has caused several changes in the curriculum, but the bulk of it remains substantially as it was. Professor Pound will give the course in Equity III, while Trusts and Pleading will again be taught by Assistant Professor Scott. Professor Wambaugh's Insurance will be only a half course. The course on New York Practice will be given by Mr. Allan Reuben Campbell, A.B., LL.B. 1902, a former editor of this Review. Patent Law will take the place of the Law of Mining and Irrigation as an extra course, and will be conducted by Mr. Odin Barnes Roberts, S.B., A.M., LL.B. A new departure is marked by a short course on Brief-making, to be given by Mr. William G. Thompson, A.B., LL.B., 1891. Arrangements have also been made by the Law School Faculty for a class in Physical Culture at the Gymnasium open to all students of this Law School.

THE AMES COMPETITION. — A few revisions in the rules governing the competition have been found necessary, but its great success last year has assured its continuance in substantially the same form, an elimination tournament between the second-year law clubs in the argument of moot cases. The prizes of \$200 and \$100, out of the fund given by Mrs. James Barr Ames, were won last year by the Choate and Bryce Clubs respectively, who contested in the finals. The supervision of the competition is again in the hands of the Board of Student Advisers, which this year is made up of Zechariah Chafee, Jr., Chairman, Maxwell Barus, George S. Brengle, Ralph O. Brewster, Earle T. Fiddler, Robert W. Perkins, Jr., Vincent Starzinger, and G. Tracy Vought, Jr.

EFFECT OF RECEIVERSHIP OF CORPORATION ON ITS EXECUTORY CONTRACTS. — The law of the liability on executory contracts of a corporation in the hands of a receiver is in a most unsatisfactory condition. Courts are not even agreed as to the issues involved. Some judges confine their arguments to the question whether or not the insolvent corporation has an excuse of impossibility of performance, while others deal solely with the question of the provability of the claim.¹ As to the first question it seems clear that the receivership proceedings do not necessarily make performance by the corporation impossible, since the receiver often has power to carry on the contract.² Even where the impossibility does exist, it should not be held to terminate existing contracts. The corporation has acted in such a way that it cannot perform its agreement with the plaintiff without imperiling the rights of its other creditors. The refusal of the state to permit performance under such circumstances is merely the legal consequence of the corporation's own acts, and should not excuse the latter from liability.³ There is, however, considerable authority for the contrary view.⁴

The further question whether this liability, when established, is a basis for a provable claim presents more serious difficulties. In the first place, opinions differ as to whether or not the status of claims should be determined as of the date of the beginning of the receivership proceedings.⁵ Since, however, it will generally be impracticable to hold open the settlement of the estate until the date for the performance of all contracts has arrived, the same problem remains whatever date of provability be decided upon. One argument against allowing the claim in question to be proved at all is that, if the contract is still executory on both sides, the liability of the corporation is contingent on per-

¹ There is a like difference of opinion as to the liability of a bankrupt under similar circumstances. One view is that the adjudication in bankruptcy annuls all contracts. *In re Jefferson*, 93 Fed. 948; *In re Inman & Co.*, 171 Fed. 185. By the weight of authority, however, liability of some sort remains. *In re Neff*, 157 Fed. 57. See *Watson v. Merrill*, 136 Fed. 359, 363; *In re Roth*, 181 Fed. 667, 670.

² *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250.

³ *Rosenbaum v. United States Credit System Co.*, 61 N. J. L. 543, 40 Atl. 591; *Peck v. Southwestern Lumber and Exporting Co.*, 59 So. 113 (131 La.). Even the dissolution of a corporation should not terminate its contracts any more than death does those of an individual. *Mumma v. Potomac Co.*, 8 Pet. (U. S.) 281.

⁴ *People v. Globe Mutual Life Ins. Co.*, 91 N. Y. 174. This case is regarded as the leading one denying liability, and yet much of the reasoning in the opinion applies only to contracts for personal service. On any other interpretation it is in conflict with later New York decisions. Cf. *People v. St. Nicholas Bank*, 151 N. Y. 592, 45 N. E. 1129; *People v. Metropolitan Surety Co.*, 205 N. Y. 135, 98 N. E. 412. In the following cases, however, liability on ordinary mercantile contracts was denied: *Malcomson v. Wappoo Mills*, 88 Fed. 680; *Griffith v. Blackwater Boom and Lumber Co.*, 46 W. Va. 56, 33 S. E. 125; *Tennis Bros. Co. v. Wetzel, etc. Ry. Co.*, 140 Fed. 193.

⁵ The view that claims must be looked at as of that date is supported by technical arguments. *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200; *Dean and Son's Appeal*, 98 Pa. St. 101. It is also urged that it is necessary to prevent delay. *People v. Commercial Alliance Life Ins. Co.*, 154 N. Y. 95, 47 N. E. 968. Nevertheless it seems possible to adopt a later date without causing any serious delay, and there are obvious advantages in so doing. *Pennsylvania Steel Co. v. New York City Ry. Co.*, C. C. A., Second Circ., 1912. A further possibility is to avoid any fixed rule as to date of provability. This practice has been adopted by the English courts as the result of a statute. THE COMPANIES' ACT, 1862 (25 & 26 VICT., c. 89), § 158; *In re Northern Counties of England Fire Ins. Co.*, 17 Ch. D. 337.

formance by the other contracting party.⁶ In order to overcome this difficulty, some courts argue that the claim can be transformed into an action for damages, on the theory that the receivership is an anticipatory breach of the contract.⁷ Even if the general doctrine of anticipatory breach be accepted, it is difficult to hold that the receivership is such a breach and satisfactorily account for the receiver's right to insist on performance of the contract.⁸ However, apart from statutory difficulties,⁹ there is no necessity for relying on that doctrine. The obligation to perform the contract is one of the corporation's liabilities, and, as a recent case points out, the obligee should receive the same consideration as the other creditors unless a more substantial reason than the technical question of contingency exists for treating him differently. *Pennsylvania Steel Co. v. New York City Ry. Co.*, "*Express Co.'s Appeal*," C. C. A., Second Circ.

It has been urged that such a reason is found in the right of the corporation to carry out the contract itself provided that it resumes business in time to do so.¹⁰ Yet since it is most unlikely that the corporation will ever be able to take advantage of this right, and since its interests are adequately protected by the receiver's authority to adopt all beneficial contracts, it is scarcely equitable to preserve this right at the cost of leaving the creditor practically without redress.¹¹ The latter's claim should therefore be held to be provable if its value can be computed in money. American courts are inclined to exaggerate their own inability to estimate the value of claims,¹² but it seems clear that a court which is accustomed to estimate the damages caused by a breach of contract to-day should generally be capable of assessing those which will arise from a breach to-morrow.¹³ Therefore, the provability of a contract claim should not be denied merely because the contract is as yet unbroken.¹⁴

⁶ It has been suggested that the claim is contingent also on the receiver's refusal to adopt the contract. See *Watson v. Merrill*, *supra*. It seems clear, however, that an obligation is none the less absolute because it is uncertain whether the court through its agent, the receiver, will specifically perform it or not.

⁷ *In re Neff*, *supra*; *Ex parte Stapleton*, 10 Ch. D. 586.

⁸ Cf. *Gibson v. Carruthers*, 8 M. & W. 321; *New England Iron Co. v. Gilbert R. Co.*, 91 N. Y. 153.

⁹ For the probability of contingent claims under the National Bankruptcy Act of 1898, see 23 HARV. L. REV. 636.

¹⁰ *In re Imperial Brewing Co.*, 143 Fed. 579; *Watson v. Merrill*, *supra*.

¹¹ *Ex parte Pollard*, 2 Low. 411. No less illusory are the rights secured to the contract creditor by the rule of a recent case which allows him to come in only after the other claimants have been satisfied. *People v. Metropolitan Surety Co.*, *supra*.

¹² *Riggin v. Magwire*, 15 Wall. (U. S.) 549. Even the court which decided the principal case refused to permit proof of claims whose value was really doubtful. *Pennsylvania Steel Co. v. New York City Ry. Co.*, *supra*, "*Crosstown Co.'s Appeal*." The English courts are compelled by statute to take a more liberal view. THE COMPANIES' ACT, 1862, *supra*; THE BANKRUPTCY ACT, 1869 (32 & 33 VICT., c. 71), § 31; *In re English Joint Stock Bank*, L. R. 4 Eq. 350; *Ex parte Blakemore*, 5 Ch. D. 372.

¹³ Certainly the difficulty is not materially lessened by calling the insolvency an anticipatory breach.

¹⁴ This appears to be the view of most of the cases in jurisdictions where the issue has not been confused by the impossibility argument. *Spader v. Mural Decoration Mfg. Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *Insurance Commissioner v. People's Fire Ins. Co.*, 68 N. H. 51, 44 Atl. 82; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151.

THE WIFE'S RIGHT OF ACTION FOR LOSS OF CONSORTIUM.—The interest of the wife in her relations with the husband falls naturally into two classes,—substantial and personal. The first is the right of support for her physical welfare; the second the right to his society, companionship, and affections.¹ At common law the wife had no effective way of enforcing either class, because of her inability to sue in her own name and to own separate property.² As a consequence the law grew up one-sided, protecting the husband's marital interests only.³ How far the wife has been emancipated from the inferior position in which the common law placed her is not yet clear. Under universal married women's acts⁴ a wife is allowed to sue for alienation of her husband's affections,⁵ and for criminal conversation.⁶ By special enabling statutes she may sue for loss of support in cases of intoxication of the husband.⁷ Two recent cases are interesting as marking the present limits of a wife's right to recover for loss of *consortium*. In one it was held that an action for loss of *consortium* would lie against a druggist who in spite of the wife's protests sold morphine to her husband from the use of which he became mentally unbalanced. *Flandermeyer v. Cooper*, 98 N. E. 102 (Oh.).⁸ In the other the wife was denied a recovery for loss either of support or *consortium* arising from a negligent injury to the husband. *Brown v. Kistleman*, 98 N. E. 631 (Ind.).

In allowing damages for an injury to the marital relation two interests are to be considered,—the individual and the social. Not only is the relationship an advantageous one for the parties, but it is the basis of our social organization. To the essentially personal element the wife con-

¹ *Consortium* is properly used in this sense. *Feneff v. New York Central & Hudson River R. Co.*, 203 Mass. 278, 89 N. E. 436. Great confusion exists in the cases because it is sometimes used as including the right to services or support. *Marri v. Stamford Street R. Co.*, 84 Conn. 9, 78 Atl. 582. In this note the term is limited to its narrower meaning.

² "Notice is taken only of the wrong of the superior; while the loss of the inferior is totally disregarded." 3 BL. COMM. 143. See COOLEY, TORTS, 3 ed., 472.

³ The husband was allowed to recover in *Winsmore v. Greenbank*, Willes, 577 (alienation of affections); *Brown v. Spaulding*, 63 N. H. 622, 4 Atl. 394 (criminal conversation); *Smith v. City of St. Joseph*, 55 Mo. 456 (negligence resulting in personal injuries); *Mowry v. Clancy*, 43 Ia. 609 (malpractice by a doctor); *Rogers v. Smith*, 17 Ind. 323 (malicious prosecution); *Hoard v. Peck*, 56 Barb. (N. Y.) 202, *Holleman v. Harward*, 119 N. C. 150, 25 S. E. 972 (sale of injurious drugs); *Garrison v. Sun Printing and Publishing Association*, 150 N. Y. App. Div. 689 (slander and libel).

⁴ The Ohio statutes are typical. "A married woman shall sue and be sued as if she were unmarried." OHIO, REV. STAT., 1906, § 4996. "A married person may take, hold or dispose of property, real or personal, the same as if unmarried." OHIO, REV. STAT., 1906, § 3114.

⁵ *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17; *Gerner v. Gerner*, 185 Pa. St. 233, 39 Atl. 884; *Wolf v. Frank*, 92 Md. 138, 48 Atl. 132. *Contra*, *Duffies v. Duffies*, 76 Wis. 374, 45 N. W. 522; *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961; *Lellis v. Lambert*, 24 Ont. App. 653. New Jersey was considered until recently to be one of the states denying the wife's right of recovery. *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49. But it is now in accord with the weight of authority. *Sims v. Sims*, 79 N. J. L. 577, 76 Atl. 1063.

⁶ *Seaver v. Adams*, 66 N. H. 142, 19 Atl. 776; *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389; *Nolin v. Pearson*, 191 Mass. 283, 77 N. E. 890. *Contra*, *Kroessin v. Keller*, 60 Minn. 372, 62 N. W. 438; *Doe v. Roe*, 82 Me. 503, 20 Atl. 83. If the action is based on the suspicion thereby cast on the issue the Minnesota case is sound. It is submitted that this is not the proper theory. One case has held that the wife may recover although the husband was the seducer. *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021.

⁷ See COOLEY, TORTS, 3 ed., 506-547.

⁸ There was no allegation of loss of support.

tributes in equal manner and degree with the husband. Therefore on principle her right in the relationship should be as valuable to her as property, as is the husband's right to him. Before the Ohio case the law had developed no further than to allow the wife an action in the two direct offenses against the marital relation in which the interest of society in general as well as the individual interest is most strikingly present, — alienation of affections and criminal conversation.⁹ It is submitted that the action should lie wherever as in the Ohio case a wrongful and intentional interference with the relationship by a third party deprives the husband or wife of the *consortium* of the other; and that this is a common-law right.¹⁰

Where the loss of *consortium* results solely from a negligent injury the principle is less obvious. The interest of society in protecting the sanctity of the institution is not concerned. The Indiana case accords with the little authority on this subject in denying a recovery on the ground of double damages, since the husband will recover in his action for his physical injuries.¹¹ In Massachusetts and Connecticut the courts are even showing a tendency to deny the right of the husband to recover for loss of *consortium* resulting from negligent injury to the wife, in view of the modern legislation allowing her to recover for her own injuries.¹² But if our conclusion that the personal interest in the marital relationship is a distinct property right is correct, it is clear that damages to the one are not compensation for the injury to the other. It is submitted that the practical difficulties with which the jury system sometimes confronts the administration of justice are not in this case sufficient to overcome the desirability of protecting the right.

PREFERRED STOCKHOLDER'S RIGHT OF PREËMPTION. — When a corporation increases its capital stock, the existing stockholders have a right in most states to subscribe for the new issue in proportion to their holdings before it can be otherwise disposed of.¹ The rule is based on the principle that each stockholder is entitled to an opportunity to preserve his proportionate share in the control of the corporation and in the capital, surplus, and other assets of the enterprise.² Moreover, it has a practical

⁹ This branch of the law is of very recent growth. The leading case was decided in 1880. *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027. But the subject was discussed in 1861. *Lynch v. Knight*, 9 H. L. C. 577.

¹⁰ *Haynes v. Nowlin*, *supra*; *Foot v. Card*, *supra*; *Bennett v. Bennett*, *supra*.

¹¹ *Feneff v. New York Central & Hudson River R. Co.*, *supra*; *Goldman v. Cohen*, 30 N. Y. Misc. 336, 63 N. Y. S. 459; *Glenn v. Western Union Tel. Co.*, 1 Ga. App. 821.

¹² *Bolger v. Boston Elevated Ry. Co.*, 205 Mass. 420, 91 N. E. 389; *Feneff v. New York Central & Hudson River R. Co.*, *supra*; *Marri v. Stamford Street R. Co.*, *supra*. The court says that the right of *consortium* is too vague and indefinite a right. The same argument would apply to the other cases in which an action for its loss is allowed. The fear of excessive jury verdicts is probably the underlying reason for the decisions. For a discussion of this subject see 10 COL. L. REV. 678, and 24 HARV. L. REV. 501.

¹ *Gray v. President, etc. of Portland Bank*, 3 Mass. 363; *Electric Co. of America v. Edison Electric Illuminating Co.*, 200 Pa. St. 516, 50 Atl. 164. See 4 THOMPSON, CORPORATIONS, § 3642; TAYLOR, CORPORATIONS, 5 ed., § 569.

² See *Dousman v. Wisconsin, etc. Co.*, 40 Wis. 418, 421; *Jones v. Morrison*, 31 Minn. 140, 153, 16 N. W. 854, 861.

foundation in that it protects stockholders from issues to a particular person or clique, unduly favored by the body in whom the power to increase the capital rests.³ On the other hand the business efficiency of a corporation would be seriously hampered by confining the discretion of the controlling faction too narrowly as to the need and method of increasing its capital. The doctrine of preëmption, therefore, should be applied as a flexible principle rather than as a rigid rule. Thus it is usually held that stockholders may subscribe *pro rata* at par even though the stock sells at a premium.⁴ Yet with the consent of the majority it may be offered to all subscribers *pro rata* at any fixed price less than the market value.⁵ A secret sale to the highest bidder is enjoined as discriminatory;⁶ but a public auction might be permissible on the theory that each stockholder is given an opportunity to maintain his proportionate interest.⁷ Where the success of the entire enterprise depends upon purchasing a particular piece of property, it may be purchased by an issue of stock to the owner thereof.⁸ But where new stock was needlessly offered to friends of the officers without regard to the right of preëmption, the same court granted an injunction.⁹ Still further limitations are imposed on the principle by statutes¹⁰ and by the charter or by-laws of individual corporations.¹¹ A similar flexibility prevails as to the remedy granted for a violation of the right. Where the stock is easily obtainable on the market, damages at law furnish substantial relief.¹² But when the stock is not on the market or the control of the corporation is involved an injunction is usually granted.¹³

A recent decision in which a preferred stockholder was denied an injunction against issuing new stock at par to common stockholders only, "but upon condition that he be allowed to subscribe for an equivalent amount of preferred stock at par," raises an important problem in the application of this principle on which there is singularly little authority. *Russell v. American Gas and Electric Co.*, 47 N. Y. L. J. 2047. Except for such preferences as are specifically given by the articles of association, the status of all classes of stockholders is the same, and consequently each stockholder is entitled to subscribe for his *pro rata* share of a new issue whether it be preferred or common.¹⁴ Possibly where strong conflicting interests exist between the holders of different classes of stock as distinct entities, the court might be justified in making its refusal of an injunc-

³ *Electric Co. of America v. Edison Electric Illuminating Co.*, *supra*; *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44.

⁴ *Hammond v. Edison, etc. Co.*, 131 Mich. 79, 90 N. W. 1040. Cf. *Cunningham's Appeal*, 108 Pa. St. 546. See 4 THOMPSON, CORPORATIONS, § 3643.

⁵ *Stokes v. Continental, etc. Co.*, 186 N. Y. 285, 78 N. E. 1090.

⁶ *Electric Co. of America v. Edison Electric Illuminating Co.*, *supra*.

⁷ See *Stokes v. Continental, etc. Co.*, 186 N. Y. 285, 298, 78 N. E. 1090, 1094.

⁸ *Meredith v. New Jersey, etc. Co.*, 55 N. J. Eq. 211, 37 Atl. 539.

⁹ *Way v. American Grease Co.*, *supra*.

¹⁰ *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294.

¹¹ *Aspinwall v. Butler*, 133 U. S. 595, 10 Sup. Ct. 417.

¹² *Gray v. President, etc. of Portland Bank*, *supra*; *Stokes v. Continental, etc. Co.*, *supra*.

¹³ To compel a shareholder to part with a fraction of his interest for damages would amount to private eminent domain. *Dousman v. Wisconsin, etc. Co.*, *supra*; *Hammond v. Edison, etc. Co.*, *supra*.

¹⁴ *Jones v. Concord, etc. R. Co.*, 67 N. H. 119, 38 Atl. 120. See 4 THOMPSON, CORPORATIONS, § 3647.

tion conditional upon a ratable issue of each kind. But where, as in the principal case, no such class differences appear, such a condition seems an unwarranted interference with the discretion of the associates.¹⁵ Moreover, as preferred is selling below par and common at a premium, it violates the preëmption rule by discriminating in favor of common stockholders. The denial of an injunction, however, might be justified on the ground that, as common stock could be purchased in the market, damages at law furnished adequate relief to the appealing preferred stockholder.

DISTRIBUTION OF DIVIDENDS ON STOCK BETWEEN LIFE TENANT AND REMAINDERMAN. — The rights of the life tenant and remainderman where stock has been granted or bequeathed in trust for the use of one for life with remainder over to the other, have been the subject of great controversy. The tendency of the early English cases was to give all extraordinary dividends to the remainderman.¹ As finally settled by the House of Lords the English law gives all stock dividends to the remainderman and all cash dividends to the life tenant, unless the company could not legally increase its capital stock, in which case extraordinary dividends go to the remainderman.² The American courts may be divided roughly into three groups. Those which follow the "Massachusetts" rule, which is similar to the English rule, allot all dividends in the form of a new issue of stock to the remainderman, all cash dividends from earnings to the life tenant.³ Under the "Pennsylvania" rule no distinction is made between stock and cash dividends. Each is apportioned between the life tenant and remainderman respectively according as it represents earnings since or before the creation of the trust fund.⁴ The "New York and Kentucky" rule awards dividends, whether stock or cash representing accumulated earnings, to the life tenant.⁵ A recent

¹⁵ Ordinarily the amount and class of stock to be issued is left wholly to the discretion of the associates. *Page v. Whittenton Mfg. Co.*, 97 N. E. 1006 (Mass.); *Jones v. Concord, etc. R. Co.*, 67 N. H. 234, 30 Atl. 614. Consequently such a conditional decree would usually be an attempt by the court to do indirectly what it cannot do and ought not to do directly.

¹ *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ves. 185.

² *Bouch v. Sproule*, 12 App. Cas. 385; *Irving v. Houstoun*, 4 Paton App. Cas. 521.

³ *Minot v. Paine*, 99 Mass. 101; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423; *Boardman v. Mansfield*, 79 Conn. 634, 66 Atl. 169; *Boardman v. Boardman*, 78 Conn. 451, 62 Atl. 339; *De Koven v. Alsop*, 205 Ill. 309, 68 N. E. 930; *Millen v. Guerrard*, 67 Ga. 284 (by statute).

⁴ *Earp's Appeal*, 28 Pa. St. 368; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739; *Miller v. Payne*, 136 N. W. 811 (Wis.); *Van Doren v. Olden*, 19 N. J. Eq. 176; *Holbrook v. Holbrook*, 74 N. H. 201, 66 Atl. 124; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472, 36 S. W. 1064; *Thomas v. Gregg*, 78 Md. 545, 28 Atl. 565. See *Ex parte Humbird*, 114 Md. 627, 641, 80 Atl. 209, 214. *Quinn v. Safe-Deposit and Trust Co.*, 93 Md. 285, 48 Atl. 835, seems *contra* on the question of apportionment. It is probable that this rule is applied only to extraordinary dividends, regular dividends going to the life tenant regardless of their source. See *Earp's Appeal*, 28 Pa. St. 368, 375; 1 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 466. But see *Lang v. Lang*, 57 N. J. Eq. 325, 328, 41 Atl. 705, 706.

⁵ *McLouth v. Hunt*, 154 N. Y. 179, 48 N. E. 548; *Hite v. Hite*, 93 Ky. 257, 20 S. W. 778; *Cox v. Gaulbert*, 147 S. W. 25 (Ky.). See *Kalbach v. Clark*, 133 Ia. 215, 110 N. W. 599. Maine adopts that feature common to both the "Massachusetts" and "New York and Kentucky" rules which disregards the time during which the earnings

Delaware case following the Massachusetts cases awards to the remainderman stock representing additions to the corporation's plant made from earnings since the creation of the trust fund. *Bryan v. Aikin*, 82 Atl. 817 (Del.).

Any rule must have as its basis the intent of the grantor or testator.⁶ In general it would seem that the grantor or testator regards as the *corpus* the undivided interest, represented by the stock certificates, in the assets of the corporation at the time of the creation of the trust, and as income any earnings of the total corporate assets of which this *corpus* is an undivided fraction which may be distributed by the corporation. Logically, then, the "Pennsylvania" rule would seem correct in denying to the life tenant such part of the dividend as represents earnings previous to the creation of a trust fund. There are serious practical difficulties, however, in the application of this theory which have influenced many courts.⁷ The Pennsylvania court itself has adopted the practical expedient of giving to the remainderman only so much as is necessary to compensate him for any depreciation in the value of the original trust fund.⁸ The issue of stock dividends presents a further difficulty. The interest of the shareholder in the corporate funds after such issue remains the same. Only the evidences of his interest have been changed and in reality no distribution of earnings has been made.⁹ In this regard the "Massachusetts" rule would seem preferable. Even if the view that stock dividends are substantially distributions of funds is accepted, the practice of the courts following the "Pennsylvania" and "New York and Kentucky" rules is still open to objection. The new stock conveys an interest not only in the earnings which its issue capitalized, but also in the old capital. The benefit of any enhancement in value of the original capital thus inures to the life tenant, — a benefit to which he is obviously not entitled under any view.¹⁰ Neither the "Pennsylvania" nor the "New York and Kentucky" rule then seems free even from theoretical difficulties. The "Massachusetts" rule, though open to some objections, has the great advantage of affording a simple working rule for the guidance of trustees.

POLICE POWER AND INTERSTATE COMMERCE. — The power to provide for the peace, health, morals, and safety of society comprises what are in fact the ultimate aims of government. All activity, not excepting interstate commerce, must be under its domain. It is conceivable that the federal government might exercise it as incidental to some express power conferred upon it. But because of the intimate relation of the subjects of this power to the welfare of each community, and the necessarily

were made. *Richardson v. Richardson*, 75 Me. 570. Minnesota makes no distinction between stock and cash dividends. *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6. The Supreme Court of the United States, Rhode Island, and Virginia adopt that part of the "Massachusetts" rule by which stock dividends are regarded as a part of the *corpus*. *Gibbons v. Mahon*, 136 U. S. 549; *Brown v. Larned*, 14 R. I. 371. Cf. *Kaufman v. Charlottesville Woolen Mills*, 93 Va. 673, 25 S. E. 1003.

⁶ *Gibbons v. Mahon*, *supra*.

⁷ *Irving v. Houstoun*, *supra*; *Lyman v. Pratt*, *supra*.

⁸ *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320.

⁹ *Boardman v. Mansfield*, *supra*.

¹⁰ *Carter v. Crehore*, 12 Hawaii 309.

different conditions demanding a diversity of application in different communities, the natural seat of the police power is in the state governments. To what extent, by conferring on Congress the power to regulate interstate commerce, the Constitution has removed this activity from the sphere of the police power as exercised by the state, has been the subject of much confusion.

Where Congress has not expressly acted,¹ the rule was early laid down² that where the subject matter in question required uniformity the silence of Congress demanded its freedom from interference by state action; but that in matters where uniformity is not required it should be interpreted as sanctioning such interference to a certain extent. Whatever meaning this classification may have had was at least obscured by the case of *Leisy v. Hardin*,³ which held that a state statute forbidding the sale of liquor was void as to that sold in the "original packages," because liquor was a subject of commerce and its transportation therefore was a matter as to which there must be uniformity. And yet the transportation of oleomargarine, a healthful, nutritious food, which, although colored to resemble butter, contained nothing deleterious, is held to be a subject not requiring uniformity.⁴ Such a distinction is difficult to understand. It would seem that the sale of liquor, whether in the "original packages" or not, was particularly a matter as to which local regulation should prevail. Congress seemed to confirm this view in passing the Wilson Act,⁵ whereby the states were expressly empowered to make their own regulations as to the sale of liquor whether affecting interstate commerce or not.⁶ In short, without a clearer definition of subjects requiring uniformity such a classification seems of little value.

There must be police power and it must reside in the states. It must necessarily at times affect interstate commerce the control of which has been vested in Congress. As in many questions of constitutional law, no definite rules can be laid down as to what interference is permissible. The importance and necessity of the police regulation on the one hand, which includes the question whether its scope exceeds the exigencies of the case,⁷ and on the other hand the extent of its encroachment on interstate commerce,⁸ must be regarded. Statutes discriminating against in-

¹ Of course where Congress has expressly undertaken to regulate any subject of interstate commerce, all interference by the states is clearly forbidden.

² *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (U. S.) 299.

³ 135 U. S. 100, 10 Sup. Ct. 681.

⁴ *Plumley's Case*, 156 Mass. 236.

⁵ 26 U. S. STAT. AT LARGE, 313, c. 728. The constitutionality of this act was sustained. *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865.

⁶ *Leisy v. Hardin* is still law, however, in so far as it has not been affected by the Wilson Act. *Louisville & Nashville R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189.

⁷ *Railroad Co. v. Husen*, 95 U. S. 465.

⁸ Inspection laws are usually constitutional. *McLean & Co. v. Denver & Rio Grande R. Co.*, 203 U. S. 38, 27 Sup. Ct. 1; *Savage v. Jones*, 32 Sup. Ct. 715; *Standard Stock Food Co. v. Wright*, 32 Sup. Ct. 784. And so quarantine laws. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 6 Sup. Ct. 1114. Statutes have been upheld forbidding the running of freight trains on Sunday, *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086; requiring the licensing of all engineers, *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564; requiring trains to whistle and slow down at crossings, *Southern Ry. Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594. Statutes have been held unconstitutional requiring interstate trains to stop at county seats, *Illinois*

terstate matters are clearly objectionable.⁹ The intent of the legislature should be considered to a certain extent as to whether its primary object is a purely police regulation or a regulation of commerce.¹⁰ A recent case held a statute requiring the marking of convict-made goods to be an unconstitutional interference with interstate commerce. *In re Opinion of the Justices*, 98 N. E. 334 (Mass.).¹¹ Since laws which discriminate against convict-made goods have been held an invalid exercise of the police power under the Fourteenth Amendment,¹² this holding seems unquestionable. For even although a statute may be justified by the police power as due process of law under the Fourteenth Amendment¹³ it must be more clearly a necessary exercise of the police power to justify any interference with interstate commerce.¹⁴ Subject to these various considerations the question must be asked in each individual case: Has the interference with interstate commerce been unreasonable? This question must be answered by the court on the particular state of facts presented.

APPORTIONMENT OF INSURANCE BETWEEN COMPOUND AND SPECIFIC POLICIES. — A provision frequently found in insurance policies limits the liability of the insurance company to such proportion of the loss as the amount insured by its policy shall bear to the whole insurance on the property.¹ By the weight of authority, such a clause in a policy on certain property applies where the insured holds also a compound policy covering the same and additional property.² The precise basis on which the proportion referred to in such a clause shall be determined is a subject of irreconcilable conflict, because of the difficulty in fixing the amount to which the property covered by the specific policy is insured by the blanket policy.³

Of the rules suggested for determining this amount, some apparently proceed on the theory that the underwriter is entitled to regard as insuring the property covered by the specific policy, all insurance under which recovery could be had for a loss on that property. This theory is carried to an extreme in the rule fixing the amount at the face value of the blanket policy, when there has been a loss only on the property

Central R. Co. v. Illinois, 163 U. S. 142, 16 Sup. Ct. 1096; requiring railroads to furnish freight cars within certain time after notice unless a strike or public calamity prevents, Houston and Texas Central R. Co. v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491.

⁹ *Weldon v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454.

¹⁰ See 1 HARV. L. REV. 159.

¹¹ *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257.

¹² *People v. Raynes*, 136 N. Y. App. Div. 417, 120 N. Y. Supp. 1053; *aff'd in* 198 N. Y. 539, 622, 92 N. E. 1097.

¹³ *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257.

¹⁴ *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757.

¹ Such a provision is clearly enforceable if the total insurance exceeds the loss. *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481. If the loss is greater than the whole amount of the several policies, each insurance company is liable to pay the insured the whole amount of its policy. *Erb v. Fidelity Ins. Co.*, 99 Ia. 727, 69 N. W. 261. But it may be otherwise provided. *Angelrodt v. Delaware Mutual Ins. Co.*, 31 Me. 593.

² *Ogden v. East River Ins. Co.*, 50 N. Y. 388, overruling *Howard Ins. Co. v. Scribner*, 5 Hill (N. Y.) 298. *Contra*, *Clarke v. Western Assurance Co.*, 146 Pa. 561, 23 Atl. 248. *Cf.* *Storer v. Eliot Fire Ins. Co.*, 45 Me. 175.

³ See 4 COOLEY, BRIEFS ON INSURANCE, 3111 *et seq.*

covered by the specific policy.⁴ While this must be the rule where both policies are specific,⁵ it seems difficult to support, where one policy is compound, if the face value of the blanket policy is greater than the value of the property covered by the specific policy. Accordingly it has been suggested that the sum taken should be the face value of the blanket policy up to the value of the property covered by the specific policy.⁶ Where the property not covered by the specific policy also burns, it must be apparent, if the insured is to recover for that loss under the blanket policy, that the latter cannot be regarded as insuring only the property covered by the specific policy. It has, therefore, been held in such a case that the blanket policy should be taken to insure the property in question for the face value of the policy less the amount of the loss on the property covered only by the blanket policy.⁷

A rule somewhat less favorable to the insurer than those considered has been adopted in some states. It treats the blanket policy as if it originally contained a distributive clause applying the blanket amount to the different items covered by it in proportion to their values.⁸ Such clauses are not uncommon in insurance policies, but its implication, it is charged, makes a new contract for the parties. On this ground a recent New Jersey case refuses to follow the rule, and adopts instead the "Gradual Reduction Rule."⁹ *Grollimund v. Germania Fire Ins. Co.*, 83 Atl. 1108. Applicable only when at least two parts of the property covered by the blanket policy are covered also by specific policies, this rule regards the blanket policy as insuring each item to the entire amount of the policy unappropriated when the particular item is reached. The adjustment is made item by item in whatever order will work substantial justice and equity to all concerned. But it is not made clear why this rule changes the express contract of the parties any less than the preceding.

The truth would seem to be that in neither case is there a real change in the contract but merely an attempt to construe the words "whole insurance." According to the well-known rule of construction, these words should be construed most strongly against the insurer who writes the policy. The proper application of this principle, it is submitted, would result in a rule different from any of those mentioned. For, in order to construe the words most favorably to the insured, only that portion of the blanket policy should be taken as cannot be disposed of by the property not covered by the specific policy. Consequently the amount should be the difference between the face value of the blanket policy and the value of the property covered by it excluding the property covered by the specific policy.

⁴ Page v. Sun Ins. Office, 74 Fed. 203.

⁵ Farmers' Feed Co. of New Jersey v. Scottish Union & National Ins. Co. of Edinburgh, 173 N. Y. 241, 65 N. E. 1105.

⁶ See 23 HARV. L. REV. 227.

⁷ Liverpool & London & Globe Ins. Co. v. Delta County Farmers' Association, 56 Tex. Civ. App. 588, 121 S. W. 599; Angelrodt v. Delaware Mutual Ins. Co., *supra*; Cromie v. Kentucky and Louisville Mutual Ins. Co., 15 B. Mon. (Ky.) 432. In practice, this rule might prevent pro-rating altogether.

⁸ Blake v. Exchange Mutual Ins. Co., 12 Gray (Mass.) 265; Chandler v. Insurance Co. of North America, 70 Vt. 562, 41 Atl. 502. As a result of its application in the latter case, this is commonly called the "Vermont rule."

⁹ This rule, sometimes called the "Connecticut rule," was first enunciated in Schmaelzle v. London & Lancashire Fire Ins. Co., 75 Conn. 397, 53 Atl. 863.

RECENT CASES.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — DEEDS WHICH ARE VOID AS TO CREDITORS. — A. conveyed land to B., but the deed was never recorded. Subsequently A. became bankrupt, and his trustee seeks to recover the land. A state statute declares unrecorded deeds to be void against judgment creditors without notice. Under § 8 of the Bankruptcy Act of June 25, 1910, trustees in bankruptcy, "as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." *Held*, that the trustee cannot prevail. *Sparks v. Weatherly*, 58 So. 280 (Ala.).

In spite of the provision of the Act of 1898, § 67a, that "claims which for want of record or for other reasons could not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," the cases prior to the passing of the 1910 amendment relegated the trustee in bankruptcy to the shoes of the bankrupt. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481; *Crucible Steel Co. v. Holt*, 174 Fed. 127. Bankruptcy thus deprived the creditors of rights which personally they could have asserted, and the 1910 amendment was intended to strengthen the position of the trustee. See SENATE REPORT NO. 691, 61st Congress, 2d session. The court in the principal case construes the language of the amendment as entitling the trustee to proceed as an individual creditor in subjecting the assets of the bankrupt, and not as a creditor armed with a judgment. In view of the express words of the act, and the intention of Congress, it is submitted that the decision in the principal case wrongly limits the effect of the amendment. *Cf. In re Gehris-Herbine Co.*, 188 Fed. 502; *In re Calhoun Supply Co.*, 189 Fed. 537. See COLLIER, BANKRUPTCY, 9 ed., § 47, II (d).

CARRIERS — DISCRIMINATION AND OVERCHARGE — RIGHT TO EXTEND LONGER CREDIT TO ONE SHIPPER THAN TO ANOTHER. — An indictment charged that the defendant railway company, according to an agreement made at the time of shipment, accepted at the time of the monthly settlement the note of a coal company for part of the freight charges. In transactions with other coal companies the defendant exacted payment in cash at the time of the monthly settlement. *Held*, that the demurrer to the indictment should be overruled. *United States v. Hocking Valley Ry. Co.*, 194 Fed. 234.

The court in the principal case finds that the facts charged constitute the offense of discrimination in transportation in violation of the Interstate Commerce Act as amended in 1906. U. S. COMP. STAT., SUPP. 1909, 1153, § 6. Only unjust discriminations are within the meaning of the statute. *Interstate Commerce Commission v. Baltimore and Ohio R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844. It is well settled that it is not an unjust discrimination for a carrier to require prepayment of freight received from one connecting carrier while not requiring it when received from another. *Little Rock and Memphis R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775. This doctrine has been applied to a case where prepayment was required from shippers on goods when billed to one consignee and not when billed to others. *Gamble-Robinson Co. v. Chicago and N. W. Ry. Co.*, 168 Fed. 161. The scope of this decision was confined by the principal case to cases where requiring prepayment is used as a precaution to insure the payment of the full legal rate. The result reached is very desirable. Extending greater credit to one shipper than to another as in the principal case gives the favored shipper a greater use of the carrier's capital and seems clearly an unjust discrimination.

CONSPIRACY — CRIMINAL LIABILITY — TRIAL WHERE OVERT ACT PERFORMED. — The defendants conspired to defraud the United States of government lands. All the conspiring occurred on the Pacific Coast, but the overt acts were committed in the District of Columbia. The prisoners were tried and convicted in the District. *Held*, that the District of Columbia court has jurisdiction. *Hyde v. United States*, 32 Sup. Ct. 793.

The Sixth Amendment of the Constitution provides that all crimes shall be prosecuted in the "district wherein the crime shall have been committed." Like the other amendments comprising the "Bill of Rights" this is construed not as announcing novel doctrines but as reaffirming old principles. See *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 329; *Mattox v. United States*, 156 U. S. 237, 243, 15 Sup. Ct. 337, 340. At common law the venue could be laid either in the county of the conspiring or in the county of an overt act in furtherance thereof. *Rex v. Brisac*, 4 East 164. See *People v. Mather*, 4 Wend. (N. Y.) 230, 261. But see *Regina v. Best*, 1 Salk. 174. The principal case does not rest solely upon this common-law rule, for under the federal statute an overt act must be proved. U. S. COMP. STAT. 1901, § 5440. Since by statute an offense begun in one district and completed in another may be prosecuted in either, it would seem logically to follow that there would be jurisdiction where an overt act was performed. *Robinson v. United States*, 172 Fed. 105. But there are *dicta* that even under the statute the overt act forms no part of the crime and merely affords a *locus pœnitentiæ*. See *United States v. Britton*, 108 U. S. 199, 204, 2 Sup. Ct. 534; *Hyde v. Shine*, 199 U. S. 62, 76, 25 Sup. Ct. 760, 761. It seems a paradox to hold the overt act essential to complete the crime but yet no part of it. Moreover, since the question in the principal case is the procedural one of venue, and does not necessarily involve the jurisdiction of the sovereign power, the doubt of the minority seems unjustified.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: CIVIL, POLITICAL, AND RELIGIOUS — EMPLOYER'S RIGHT TO REQUIRE EMPLOYEE NOT TO REMAIN IN TRADE UNION. — A statute made it a crime for an employer to require an agreement to have no connection with any labor union as a condition of keeping or securing employment. *Held*, that the statute is constitutional. *State v. Copping*, 125 Pac. 8 (Kan.). *Contra*, *State ex rel. Smith v. Daniels*, 136 N. W. 584 (Minn.).

The power, subject to police regulation, to make or break contracts of personal service without criminal liability is secured by the Constitution. *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007. It has been suggested in an analogous case that use of the power as a means of coercion may destroy the immunity. See 20 HARV. L. REV. 253, 270. But coercion is no more involved in a discharge for not agreeing to be non-union than in a discharge expressly because of union membership. And statutes forbidding discharge on the latter basis are always held unconstitutional. *Adair v. United States*, 208 U. S. 161, 28 Sup. Ct. 277; *State ex rel. Zillmer v. Kreuzberg*, 114 Wis. 530, 90 N. W. 1098. The decision of the Kansas court, therefore, seems wrong. *People v. Marcus*, 185 N. Y. 257, 77 N. E. 1073. Labor unions in this country are recognized as clearly legal. See 25 HARV. L. REV. 465. But they are hardly so favored by the law that the foundation of a contract not to join one could be made criminal as against public policy. In the case of public service companies, however, termination of the contract of employment could perhaps, where there is public necessity, be regulated with, or even without, legislation. See *Arthur v. Oakes*, 63 Fed. 310, 319; *Farmers' Loan & Trust Co. v. Northern Pacific R. Co.*, 60 Fed. 803, 813.

CONTRACTS — REMEDIES FOR BREACH OF CONTRACT — RECOVERY UNDER CONTRACT AFTER BREACH. — The defendant agreed to pay a certain sum in

monthly installments, in consideration of the plaintiff's promise to give instructions by correspondence in engineering until the defendant was qualified for a diploma. After two installments the defendant repudiated the contract. *Held*, that the plaintiff may recover for all installments as they become due. *International Correspondence Schools v. Ayres*, 106 L. T. R. 845 (Eng., K. B. D., Apr. 30, 1912).

The soundness of the decision in the principal case must rest on the ground that the defendant relied upon his remedy and did not intend to make performance a condition precedent. There has been such a holding in the somewhat analogous cases of contracts where the date of payment precedes delivery, and in insurance or other aleatory contracts. *Matlock v. Kinglake*, 10 A. & E. 50; *Christie v. Borelly*, 29 L. J. C. P. 153. In these cases there has been a tendency in England to enforce the promise as independent. *Dunlop v. Grote*, 2 C. & K. 153. See SALE OF GOODS ACT, 1893 (56 & 57 VICT. c. 71), § 49. Perhaps a more natural interpretation of a contract such as that in the principal case would conceive of the parties as contemplating the ordinary equivalent exchange of performances. *International Text-Book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98. In schools where the cost of maintenance is constant, reduction of damages would be impracticable. *Collins v. Price*, 5 Bing. 132. But, on the facts presented by the principal case, from the agreed price could be deducted the expense in postage and typewriting, which the repudiation saved the school. *International Text-Book Co. v. Schulte*, 151 Mich. 149, 114 N. W. 1031. It is submitted that where, as here, no clearly defined intention appears, the equitable result would be to regard each performance as dependent on the other.

CORPORATIONS — STOCKHOLDERS — RIGHTS INCIDENT TO MEMBERSHIP — PREFERRED STOCKHOLDER'S RIGHT OF PREÉMPTION. — A corporation voted to increase its capital by issuing common stock and giving a right of preemption at par to common stockholders only. A preferred stockholder brought a bill to restrain the issue unless the preferred stockholders were allowed to subscribe on the same terms as the common stockholders. His motion for an injunction *pendente lite* was denied "but upon condition that he be allowed to subscribe for an equivalent amount of preferred stock at par." The preferred stockholder appealed. *Held*, that the order be affirmed. *Russell v. American Gas and Electric Co.*, 47 N. Y. L. J. 2047 (N. Y., App. Div.). See NOTES, p. 75.

CRIMINAL LAW — FORMER JEOPARDY — SEVERER PUNISHMENT FOR HABITUAL CRIMINAL. — The defendant after conviction and sentence for grand larceny was brought before another court in a separate proceeding instituted according to the West Virginia Code by information charging him with prior conviction. Upon the establishment of his identity he was sentenced with additional punishment. *Held*, that the defendant is not deprived of his constitutional rights. *Graham v. West Virginia*, 224 U. S. 616, 32 Sup. Ct. 583.

The infliction of severer punishment on old offenders when the former conviction is alleged in the indictment has been held not repugnant to the jeopardy clause of the constitution. *Moore v. Missouri*, 159 U. S. 673, 16 Sup. Ct. 179. The reason is that the additional penalty is not imposed on the former crimes but on the later offense rendered more serious by the fact of former convictions. No distinction is drawn where the identity of the defendant is established in a later proceeding prosecuted upon an information, such question being distinct from the issue of the later conviction. *Ross' Case*, 2 Pick. (Mass.) 165. That the additional punishment for the later offense is imposed subsequent to sentence for that offense does not place the defendant in double jeopardy, for it is merely a revision of the punishment given by the state for a crime, the commission of which is not in question; it is not a re-trial for the same offense.

DEDICATION — ACCEPTANCE — ADVERSE POSSESSION — Lots were sold as bounding on an unopened street, appearing on the grantor's map. There was no public acceptance of the street nor user by the public. *Held*, that the public has a right to the street. *Harrington v. City of Manchester*, 82 Atl. 716 (N. H.).

The distinction between what constitutes a dedication and what is necessary for the creation of liability for repair on the part of the public authorities is often confused. In the United States it is generally held that there must be an acceptance, express or implied, by the public authorities to charge a city or town with liability. *Maine v. Bradbury*, 40 Me. 154; *Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902. And usually acceptance is necessary to complete a dedication. *Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774; *Williams v. New York and New Haven R. Co.*, 39 Conn. 509. But a dedication made by the sale of lots with reference to a map laying out streets is irrevocable although no acceptance is made by the public. *Trustees of Methodist Episcopal Church v. Council of Hoboken*, 33 N. J. L. 13; *Mayor, etc. of Baltimore v. Frick*, 82 Md. 77, 33 Atl. 435. The principal case holds that acceptance is presumed if the gift is beneficial, since a dedication partakes of the nature of a gift. *Flack v. Village of Green Island*, 122 N. Y. 107. But this reasoning is not in accord with the authorities, which in most cases require acceptance in fact. *Holdane v. Cold Spring*, 21 N. Y. 474. Estoppel is usually given as the basis for the irrevocability, because purchasers of lots have relied on the dedication. *President, etc. of Cincinnati v. White*, 6 Pet. (U. S.) 431. But see *ANGELL, HIGHWAYS*, 3 ed., § 156.

EVIDENCE — DECLARATIONS IN COURSE OF DUTY — ENTRIES MADE BY PERSON OTHER THAN ORIGINAL OBSERVER. — Workmen reported their time expended to a clerk, who entered the time on a slip of paper. These entries were copied by another clerk into a record of the work. The original slips having been destroyed, the record was offered in evidence under the oath of both clerks, the one testifying that he had correctly entered the time on the slips as reported by the men, the other that he had copied the entries correctly into the record. *Held*, that the evidence is admissible. *Pacific Tel. & Tel. Co. v. Huettner*, 123 Pac. 607 (Wash.).

For a discussion of the principles involved, see 18 HARV. L. REV. 52; 19 HARV. L. REV. 301.

EVIDENCE — DYING DECLARATIONS — PERSONAL KNOWLEDGE BY DECEASED OF FACTS STATED. — In a trial for homicide A. testified that the deceased made a dying declaration that the defendant shot him. B. testified that the deceased said he knew the defendant shot him because his cousin had told him that the defendant was going to "get" him. *Held*, that B.'s evidence goes to the weight but not to the admissibility of A.'s evidence. *Ex parte Key*, 59 So. 331 (Ala.).

The facts of the principal case will bear two interpretations: either that the deceased had no personal knowledge of his assailant, or that he was confirmed in his own observation of his assailant by his cousin's story. If the first interpretation is correct, the court clearly erred in admitting the declaration. The dying-declaration exception to the hearsay rule can do no more than, in effect, to put the deceased on the stand. *Rex v. Sellers* (MS.), O. B. 1706, cited in CARRINGTON, SUPPLEMENT TO CRIMINAL LAW TREATISES, 233; *Whitley v. Georgia*, 38 Ga. 50. Even declarations of personal observations by the deceased in the form of opinion are excluded, though this view has been severely criticized. See 2 WIGMORE, EVIDENCE, § 1447. But there is no substantial reason whatever for admitting his fancies, or his opinions as to facts of which he has merely a hearsay knowledge. *Jones v. Mississippi*, 79 Miss. 309, 30 So. 759. If, however, on any view of the evidence in the princi-

pal case it was possible for the deceased to have known the fact stated, A.'s evidence would not be vitiated by that offered by B. *Jones v. State*, 52 Ark. 345, 12 S. W. 704.

FEDERAL COURTS — JURISDICTION BASED ON NATURE OF SUBJECT-MATTER — LACHES AS A FEDERAL QUESTION. — A state court granted an injunction against the defendants' use of a fraternal name under a federal charter, finding that it was an infringement of the plaintiff's use of the name under a similar charter, and that the plaintiff had not been guilty of laches. A writ of error was prosecuted to the United States Supreme Court on the ground that the evidence showed laches. *Held*, that the judgment be reversed. *Creswill v. Grand Lodge Knights of Pythias*, 32 Sup. Ct. 822.

The denial by a state court of the validity of an authority exercised under the United States clearly raises a federal question reviewable in the Supreme Court on writ of error. 1 U. S. COMP. STAT., 1901, § 709. The court in such cases should have the power to examine the evidence as well as the law, and reverse if the finding is clearly unsupported by the evidence. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 32 Sup. Ct. 316; *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754. *Contra*, *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452. As the court in the principal case had strong convictions as to the insufficiency of the evidence on this point a reversal might be proper, since the state court's denial of laches — unlike the finding of laches — leaves the finding on the primary federal right open to review. *Neilson v. Lagow*, 7 How. (U. S.) 772. The court, however, rests its reversal solely on the point of laches. The question of laches, although involving the denial of a federal right, is not a federal question, and the finding of the state court should be final unless the evidence of laches is so intermingled with a federal question that the two cannot be considered separately. *Moran v. Horsky*, 178 U. S. 205, 20 Sup. Ct. 856; *Pierce v. Somerset Ry.*, 171 U. S. 641, 19 Sup. Ct. 64. The principal case does not seem to fall within the latter qualification.

GIFTS — GIFTS CAUSA MORTIS — WHETHER VALID AS AGAINST HUSBAND'S RIGHTS UNDER DISTRIBUTION STATUTE. — The defendant's wife made a gift *causa mortis* of certain personalty to the plaintiff. At his wife's death the defendant took possession of the property. By statute a husband was given a certain share in his wife's personalty at her death. *Held*, that the plaintiff may recover. *Vosburg v. Mallory*, 135 N. W. 577 (Ia.).

Statutes such as that in the principal case generally provide that a husband's right to his distributive share shall be protected, although the testatrix may have made other dispositions by will. *Ward v. Wolf*, 56 Ia. 465, 9 N. W. 348; *Brigham v. Maynard*, 9 Gray (Mass.) 81. But such statutes do not operate upon property alienated *inter vivos*. *Samson v. Samson*, 67 Ia. 253, 25 N. W. 233. It has been held, however, that the husband's rights prevail against gifts *causa mortis*. *Baker v. Smith*, 66 N. H. 422, 23 Atl. 82. Such a result depends upon the theory that gifts *causa mortis* are testamentary in nature, the title passing only on the death of the donor. *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. 641. The better view, however, seems to be that inherently they are gifts, the title vesting at once in the donee, but defeasible by the donor. *Marshall v. Berry*, 13 Allen (Mass.) 43. They are subject to the rights of creditors only when the other assets of the donor are insufficient. *Seybold v. Grand Forks National Bank*, 5 N. D. 460, 67 N. W. 682. Revocation, the death of the donee, or the recovery of the donor are to be treated as conditions subsequent. *Basket v. Hassell*, 107 U. S. 602, 2 Sup. Ct. 415. Therefore, as there was no property in the testatrix at the time of her death, the statute in the principal case cannot apply. It may be regretted that so ready a means of evading the statute is allowed, but the difficulty appears to be in the narrowness of the statute itself.

GIFTS — GIFTS INTER VIVOS — WHETHER DELIVERY OF BILL OF SALE IS SUFFICIENT. — The defendant's wife delivered to him a bill of sale of all her personal property. She died having made no manual delivery of the property. Her administratrix sued to recover it. *Held*, that the gift to the defendant is valid. *Humphrey v. Ogden*, 125 Pac. 110 (Colo.).

Livery of seisin was originally necessary to pass title to personalty. See *Cochrane v. Moore*, 25 Q. B. D. 57, 65. Later a valid gift could be made by a deed sealed and delivered. *Wyche v. Greene*, 11 Ga. 159. The statute in Colorado declaring seals unnecessary in conveying real property, leads naturally to the decision in the principal case, as the law has in general demanded less formality in conveying personal property. See THORNTON, GIFTS, § 190, n. 1; COLO., REV. STAT., 1908, § 682. For instance, in Alabama a sealed instrument was held necessary for a valid gift in the absence of a statute abolishing seals. *Connor v. Trawick*, 37 Ala. 289. But under a statute similar to that in Colorado a written instrument was held sufficient. *Walker v. Crews*, 73 Ala. 412. This view seems just, for a man should be able to pass title to personalty in any way he wishes, provided it is sufficiently formal and definite to insure against fraud and mistake. A bill of sale formally declaring the passing of the title fulfils such requirements. The decision in the principal case seems, therefore, a convenient and safe result of the change in the importance of seals. *Tierney v. Corbett*, 2 Mackey (D. C.) 264.

HIGHWAYS — ESTABLISHMENT — PECUNIARY INTEREST OF COMMISSIONER. — A board of freeholders authorized by statute to lay out public highways decided by resolution to alter the location of a road to a position over the lands of one of its members who participated in the passage of the resolution. *Held*, that the resolution is voidable. *Van Gelder v. Freeholders of Cape May County*, 83 Atl. 500.

It is a universally recognized principle that personal interest in the subject matter of a controversy will disqualify a judge from passing thereon. *Dimes v. Grand Junction Canal Co.*, 3 H. L. Cas. 759. A distinction is made between municipal or other local resolutions relating to all the inhabitants or property within the jurisdictional limits and those which provide for improvements affecting particular individuals or property in one locality, the former being held within the legislative functions of the administrative board and the latter to be determinations judicial in nature. *State, West Jersey Traction Co. v. Board of Public Works of the City of Camden*, 56 N. J. L. 431, 29 Atl. 163. *Contra*, *Foot v. Stiles*, 57 N. Y. 399. Thus, as in the principal case, the acts of commissioners having an interest in the laying out of a particular highway are usually held voidable. *Petition of New Boston*, 49 N. H. 328; *State v. Delesdernier*, 11 Me. 473. But the interest must be direct. *Mitchell v. Holderness*, 29 N. H. 523. Thus the fact of being a resident of the town through which the road is to pass will not disqualify a commissioner from acting. *Inhabitants of Danvers v. County Commissioners of Essex*, 43 Mass. 185. *Cf.* *Monterey v. Commissioners of Berkshire*, 61 Mass. 394. It is submitted that the authorities taking a view opposite to that in the principal case limit unduly the field of judicial functions.

HUSBAND AND WIFE — RIGHTS AND LIABILITIES OF HUSBAND AS TO THIRD PARTIES — ACTION FOR PHYSICAL ILLNESS OF WIFE CAUSED BY PUBLICATION OF LIBELOUS WORDS. — The defendant published libelous words regarding the plaintiff's wife, and the mental anguish caused thereby resulted in her physical illness. *Held*, that the plaintiff can recover for loss of services. *Garri-son v. Sun Printing and Publishing Association*, 150 N. Y. App. Div. 689.

As a general proposition, intentional harm is actionable. *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524. Here the

plaintiff has a property right in the services of his wife, which has been damaged by the act of the defendant. *Booth v. Manchester St. Ry. Co.*, 73 N. H. 529, 63 Atl. 578; *Blaechinska v. Howard Mission*, 130 N. Y. 497, 29 N. E. 755. The defendant intended to harm the plaintiff's wife, and the result is no less intentional because the harm is of a different variety from that expected. Therefore the plaintiff's damage, being a certain result of such harm to his wife, is an intentional consequence of the defendant's act. *State v. Patterson*, 116 Mo. 505, 22 S. W. 696. But when the injury is caused through the medium of loss of reputation in the community the technicalities of libel and slander limit the recoverable consequences of defamatory words. When the defendant's words are defamatory and not actionable *per se*, physical damage of the person libeled has been held a too remote consequence to be compensated. *Allsop v. Allsop*, 5 H. & N. 534. Yet the same damage has been held proximate and the common tests of causation applied when the words were actionable *per se*. *Burt v. McBain*, 29 Mich. 260; *Van Ingen v. Star Co.*, 1 App. Div. 429, aff'd 157 N. Y. 695, 51 N. E. 1094. Accordingly a result different from that of the principal case has been reached in a similar action where the words spoken were not actionable *per se*. *Terwilliger v. Wands*, 17 N. Y. 54. Otherwise the husband would recover where the wife herself is barred. But in the principal case, the technical objections being absent, the defendant is properly liable.

HUSBAND AND WIFE — RIGHTS OF WIFE AS TO THIRD PARTIES — ACTION FOR LOSS OF CONSORTIUM. — The defendant sold morphine to the plaintiff's husband, in spite of her repeated protests, until by its use he became mentally unbalanced. *Held*, that the wife may recover for loss of consortium. *Flandermeyer v. Cooper*, 98 N. E. 102 (Oh.). See NOTES, p. 74.

The defendant by his negligence injured the plaintiff's husband. *Held*, that the wife may not recover for loss of consortium. *Brown v. Kistleman*, 98 N. E. 631 (Ind.). See NOTES, p. 74.

INJUNCTIONS — ACTS RESTRAINED — INFRINGEMENT OF PATENT BY PUBLIC OFFICERS. — The complainant filed a bill to restrain county commissioners from using, in a courthouse, a ventilating device which infringed on his patent. *Held*, that the injunction should be granted. *McCreery Engineering Co. v. Massachusetts Fan Co.*, 195 Fed. 498 (C. C. A., First Circ.).

This decision reverses that of the circuit court. See 24 HARV. L. REV. 155.

INSURANCE — AMOUNT OF RECOVERY — PRO RATA CLAUSE: OPERATION IN POLICIES NOT COEXTENSIVE. — Each of two policies of insurance on two distinct houses stipulated that the defendant should not be liable for a greater proportion of the loss than the amount for which the defendant insured the house in each case bore to the whole insurance thereon. A third policy issued by another company insured the two houses as one. *Held*, that the blanket policy should be regarded as insuring to its entire amount the house insured by one policy and as insuring to the entire amount remaining after deducting the amount paid on the first house, the house covered by the second policy. *Grollimund v. Germania Fire Ins. Co.*, 83 Atl. 1108 (N. J.). See NOTES, p. 80.

INTERSTATE COMMERCE — CONTROL BY STATE — STATUTE REQUIRING CONVICT-MADE GOODS TO BE LABELED. — A statute required that all goods made by convict labor should be labeled as such before being exposed for sale. *Held*, that the statute is unconstitutional. *In re Opinion of the Justices*, 98 N. E. 334 (Mass.). See NOTES, p. 78.

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — PUBLICATION OF OFFICIAL OPINION OF ATTORNEY GENERAL. — The Attorney General's official opinion that the owners of a race track were guilty of a felony, through the

violation of a race track statute, was quoted by the defendant newspaper. *Held*, that the report is qualifiedly privileged. *Tilles v. Pulitzer Pub. Co.*, 145 S. W. 1143 (Mo.).

A qualified privilege obtains in reports of proceedings in courts of justice or in executive or legislative bodies. See ODGERS, LIBEL AND SLANDER, 4 ed., 291, 308. Such immunity has been allowed in England to the report of proceedings of a medical investigating committee appointed under a statute. *Allbutt v. General Council*, 23 Q. B. D. 400. But this protection was refused in America to a report of a city council meeting to discuss a charter amendment. *Buckstaff v. Hicks*, 94 Wis. 34, 68 N. W. 403. The privilege rests upon the right of the public to know what goes on in a court of justice, the public advantage from consequent detection of crime, and the private interest of the accused in having the case fairly published. See BOWER, CODE OF ACTIONABLE DEFAMATION, 406. The extension to legislative and executive meetings rests on the applicability of the first of these reasons. See *Wason v. Waller*, L. R. 4 Q. B. 73, 89, 93. The principal case bases its decision on the same ground; but the public interest here seems scarcely more than a curiosity on the part of gamblers as to the illegality of their conduct, and our system of jurisprudence attempts no protection of delinquents ignorant of the law. *In the Matter of Barronet*, 1 E. & B. 1. The kind of general interest usually considered in granting immunity involves the existence of a moral or public duty of a very different nature. See ODGERS, LIBEL AND SLANDER, 4 ed., 249. The principal case extends a rule to circumstances where the reasons for the rule do not exist.

LIFE ESTATES — TRUST FUNDS — APPORTIONMENT OF STOCK DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMEN. — Stock in a corporation was bequeathed in trust for certain persons for life with remainder over to others. Funds earned by the corporation after the death of the testator were used to increase the plant. A stock dividend representing the amount of the increase was issued during the life tenant's term. *Held*, that such dividend shall become part of the principal of the trust. *Bryan v. Aikin*, 82 Atl. 817 (Del). See NOTES, p. 77.

MORTGAGES — LIMITATION OF ACTIONS — REVIVING OF MORTGAGE BY GRANTEE WITHOUT REVIVING DEBT. — Certain land was mortgaged as security for a promissory note. The mortgagor's grantee took the land subject to the mortgage but did not assume liability upon the note. After the Statute of Limitations had run against both note and mortgage, the grantee promised to pay off the mortgage. *Held*, that the grantee's promise revives the mortgage. *Fitzgerald v. Flanagan*, 135 N. W. 738 (Ia.).

At common law, where a mortgage created an estate, the mortgage could be foreclosed after the debt it secured was barred. *Colton v. Depew*, 60 N. J. Eq. 454, 46 Atl. 728; *Northrop v. Chase*, 76 Conn. 146, 56 Atl. 518. But by statute in Iowa a mortgage invests no title in the mortgagee, its only effect being to create a lien incident to the debt it secures. IOWA CODE, 1897, § 2922. And the life of the lien is determined by the life of this debt. *Clinton County v. Cox*, 37 Ia. 570; *Jenks v. Shaw*, 99 Ia. 604, 68 N. W. 900. For this reason it might be argued that the result of the principal case is incongruous. Had the grantee in the principal case assumed liability on the promissory note, clearly his promise would revive the debt and its accessory, the mortgage. *Daniels v. Johnson*, 129 Cal. 415, 61 Pac. 1107. But here the note cannot be revived by the grantee, for he never assumed liability upon it. *Moore v. Olive*, 114 Ia. 650, 87 N. W. 720. The Statute of Limitations bars recovery upon the debt but does not extinguish it. *Smith v. Washington City, etc. R. Co.*, 33 Gratt. (Va.) 617; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277. Since the debt exists it seems reasonable to hold that the bar to foreclosing the mortgage may be waived although

there can be no recovery upon the debt itself. *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747; *Neosho Valley Investment Co. v. Huston*, 61 Kan. 859, 59 Pac. 643. The mortgage, although no longer a distinct right, is still a distinct remedy.

NUISANCE — MEASURE OF DAMAGES — INFRINGEMENT OF EASEMENT: WHETHER RECOVERY FOR INJURY TO OTHER THAN THE DOMINANT TENEMENT. — The plaintiff owned two lots on a street, which had ancient lights, and a lot to the rear, which had none. They were valuable mainly as a factory site. The defendant erected a building shutting off the lights. The court refused an injunction because of the plaintiff's delay. *Held*, that the plaintiff may recover for the depreciation in value of the whole site. *Griffith v. Clay & Sons, Limited*, [1912] 2 Ch. 291.

The court in the principal case treats the infringement of the easement as permanent, as it would be if the case were one of eminent domain. *Neff v. Pennsylvania R. Co.*, 202 Pa. 371, 51 Atl. 1038. See 11 HARV. L. REV. 118. For such permanent injury to his property a plaintiff may ordinarily recover the diminution in its market value. *Rabe v. Shoenberger Coal Co.*, 213 Pa. 252, 62 Atl. 854. *Fidelity Trust Co. v. Shelbyville Water and Light Co.*, 33 Ky. L. 202, 110 S. W. 239. Damages in cases of easements are in general computed upon the property to which the easement is appurtenant. *Neff v. Pennsylvania R. Co.*, *supra*. One decision gives damages for shutting off light to all the windows in the house, not alone for those having ancient lights. *In re London, etc. Ry. Co.*, 24 Q. B. D. 326. The principal case, allowing damages for injury to each lot, is a somewhat doubtful extension of this theory, and practically adopts the general rule for damages in tort. *Cf. Rajnowski v. Detroit, etc. R. Co.*, 74 Mich. 20, 41 N. W. 847. However, the most profitable use to which the land could be put is considered in computing the market value. *Sargent v. Merrimac*, 196 Mass. 171, 81 N. E. 970. This is possible here, for the erection of new buildings by the owner will not extinguish the easement. *Ecclesiastical Commissioners for England v. Kino*, 14 Ch. D. 213. The decision could be based on the sound ground that the damage to the whole site was really the injury to the most profitable use of the front lots, *i. e.* in connection with the rear one. *Cf. Maynard v. Northampton*, 157 Mass. 218, 31 N. E. 1062.

PAROL EVIDENCE RULE — CONSTRUCTION OF DOCUMENTS — WILLS: DECLARATIONS OF INTENTION WHEN LEGATEE MISDESCRIBED. — In 1891 the testator, after giving a life estate, devised all of his freehold property to "John William Halston, the son of Israel Halston." Israel Halston had a son by this name who had died in 1874, and a younger son named John Robert Halston, who claimed the devise. To support the claim, there was offered a declaration of the testator to John Robert Halston that he was to have the land. *Held*, that the declaration is admissible. *In re Halston*, [1912] 1 Ch. 435.

All of the facts and circumstances respecting persons or property to which the will relates are legitimate evidence to enable the court to ascertain the meaning and application of the words of the will. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; *Stevenson v. Druley*, 4 Ind. 519. But to do this a court cannot hear declarations of intention by the testator, as this permits parol matter to evidence intentions which the law requires to be written in certain formalities. *Doe d. Hiscocks v. Hiscocks*, *supra*; *Wootton v. Redd*, 12 Gratt. (Va.) 196. A stronger reason seems to be the practical one that such evidence can be manufactured with great ease. See 4 WIGMORE, EVIDENCE, § 2471. However, this rule is subject to the exception that if the description in the will accurately applies to two or more persons or things, declarations by the testator are admissible to show which one is meant. *Doe d. Gord v. Needs*, 2 M. & W. 129. In such a case the declarations are used merely to expand and make more specific

the words of the document, and the practical objections are reduced to a minimum. See 4 WIGMORE, EVIDENCE, § 2472. The ruling in the principal case would destroy a well-established rule of exclusion.

PHYSICIANS AND SURGEONS — NECESSITY OF PATIENT'S CONSENT TO OPERATION. — The plaintiff consented to be operated on by the defendant for a rupture in the left groin. After the patient was under the anæsthetic the defendant found in the right groin a rupture, dangerous to the plaintiff's life, and operated on that side instead of the other. The plaintiff brought suit for assault and battery. *Held*, that the plaintiff cannot recover. *Benman v. Parsonnet*, 83 Atl. 948 (N. J.).

Ordinarily a surgeon is not justified in performing an operation more serious than the one expressly consented to. *Pratt v. Davis*, 224 Ill. 300, 79 N. E. 562. But when new conditions are found after the anæsthetic has been administered, making a different operation advisable, the public interest in the preservation of life and health gives weight to the argument that the surgeon should be allowed to use his discretion. In such a case it has been suggested that the patient impliedly consents to the different operation. See *Mohr v. Williams*, 95 Minn. 261, 269. A result of this view is seen in the suggestion by the court in the principal case that there is consent to operations similar to that authorized and no more serious. It would seem to be better to rest the justification directly on grounds of public policy rather than on the fiction of implied consent. Such a justification would be confined strictly to cases where the plaintiff's life was in immediate danger, and in all other cases he should be allowed to regain consciousness and given an opportunity to give or withhold actual consent.

POWERS — ATTEMPT TO EXERCISE A POWER CONTAINED IN THE WILL OF A LIVING TESTATOR. — A will provided that in case of a legatee's predecease, the legacy should go to whomever the legatee should appoint by will. The legatee predeceased the testatrix, leaving a will exercising the power. *Held*, that the power is not validly exercised. *In re Mayo's Will*, 136 N. Y. Supp. 1066 (N. Y., Sur. Ct.).

A power to dispose of property must be created by an instrument which would itself be sufficient to dispose of that property. *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279. Since a will can only dispose of property at the testator's death, it cannot create a power until then. *Jones v. Southall*, 32 Beav. 31. The slight weight of authority holds invalid the exercise of a power by a will executed prior to its creation. *Matteson v. Goddard*, 17 R. I. 299, 21 Atl. 914. *Contra*, *Burkett v. Whittemore*, 36 S. C. 428, 15 S. E. 616. The opposite result is reached under the English Wills Act. *Boyes v. Cook*, 14 Ch. D. 53; *Airey v. Bower*, 12 A. C. 263. But invalidity of the exercise seems inevitable where, as in the principal case, the probate of the will precedes the power's creation, because the power cannot be exercised while inchoate. *Jones v. Southall*, *supra*. The decision is further supported by the fact that the donee of the power was dead at its creation and a statute limited the exercise of powers to persons capable of transferring property. N. Y. CONSOL. LAWS, 1909, c. 52, § 114. Nor can the intent of the testator be carried out without resort to the doctrine of powers, since it is an attempt in substance to incorporate by reference a non-existing document. A provision against the lapsing of a legacy by a power of appointment in the legatee is thus impossible.

RECEIVERS — POWER TO SUE IN A FOREIGN JURISDICTION. — A statute made receivers the assignees of the corporation's property. A receiver appointed under this statute brought suit in a foreign jurisdiction against a stockholder for an assessment levied on his stock by the court in which the receivership

proceedings were being carried on. The foreign jurisdiction refused to entertain the suit. *Held*, that the judgment be reversed. *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415.

Ordinarily, a receiver is only an officer of the court which appoints him, and cannot sue in his official capacity except within the jurisdiction of that court. *Filkins v. Nunnemacher*, 81 Wis. 91, 51 N. W. 79; *Booth v. Clark*, 17 How. (U. S.) 322. The courts of some states will entertain suits by foreign receivers as a matter of comity. *Metzner v. Bauer*, 98 Ind. 425; *Hurd v. City of Elizabeth*, 41 N. J. L. 1. But if, by the laws of the state in which a corporation is being wound up, the receiver is vested with the legal title to the corporation's assets, he is then entitled to sue upon them in any state. *Relfe v. Rundle*, 103 U. S. 222. In such a case the receiver is more than an officer of the court, being invested with a legal title by the laws of one state which the courts of all other states are bound to respect under the full faith and credit clause of the Constitution. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888.

RECEIVERS — PROVABLE CLAIMS — EXECUTORY CONTRACTS. — The plaintiff company entered into an agreement with the defendant company by which the plaintiff was granted the exclusive right to carry express matter on the defendant's railway. The defendant company went into the hands of receivers who refused to adopt the agreement. *Held*, that the plaintiff can recover for breach of contract. *Pennsylvania Steel Co. v. New York City Ry. Co., "Express Co.'s Appeal,"* U. S., C. C. A., Second Circ. See NOTES, p. 72.

STATES — STATE RIGHT TO PRIORITY. — A state depository becoming insolvent, its surety paid the state the amount due. The surety then petitioned for the right of subrogation to the state's alleged priority over other creditors. A decree was granted sustaining the petition. *Held*, that such decree is error, as the state has no priority. *Potter v. Fidelity and Deposit Co.*, 58 So. 713 (Miss.).

In the few states where the common law alone governs the case, the slight weight of authority allows the state priority over the other creditors of an insolvent. *United States Fidelity and Guaranty Co. v. Rainey*, 120 Tenn. 357, 113 S. W. 397; *Seay v. Bank of Rome*, 66 Ga. 609. *Contra*, *State v. Harris*, 2 Bailey (S. C.) 598. In some jurisdictions it is held that an assignment for creditors or a transfer to a receiver in bankruptcy before the state presents its claim defeats the priority. *Maryland v. Bank of Maryland*, 6 Gill & J. (Md.) 205; *Maryland v. Williams*, 101 Md. 529, 61 Atl. 297. If priority is desirable, this rule seems to make it needlessly ineffective. *Seay v. Bank of Rome*, *supra*. The states which allow priority base their decisions on the grounds of a prerogative right derived from the common law of England. See *Maryland v. Bank of Maryland*, *supra*. The common law of England as adopted by most states would not be such binding authority as to warrant decisions not in accord with the principles underlying our form of government. *Board, etc. of Middlesex County v. State Bank*, 29 N. J. Eq. 268. But that such priority is neither contrary to these principles, nor undesirable, seems clear from the fact that in most states the legislatures have seen fit to pass statutes allowing this priority to the state. 2 MASS. REV. LAWS, c. 163, § 118; MINN. REV. LAWS, 1905, c. 90, § 4633.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — GRATUITIES TO CIVIL WAR VETERANS. — A statute provided that "every resident Civil War veteran honorably discharged . . . shall be paid by the state as state aid the sum of \$30 annually." *Held*, that the statute is unconstitutional. *Beach v. Bradstreet*, 82 Atl. 1030 (Conn.).

A proposed statute authorized a gratuity of \$125 to every Civil War veteran

who had been honorably discharged and who had not previously received a bounty for enlisting. *Held*, that such a statute would be constitutional. *In re Opinion of the Justices*, 98 N. E. 338 (Mass.).

State pensions and other gratuities to veterans of the federal army as a reward for past services have usually been held invalid as expenditures which are not for a public purpose. *Mead v. Inhabitants of Acton*, 139 Mass. 341, 1 N. E. 413; *Opinion of the Justices*, 186 Mass. 603, 72 N. E. 95. *Contra*, *State ex rel. Bales v. Trustees of Richland Township*, 20 Oh. St. 362; *Brodhead v. City of Milwaukee*, 19 Wis. 624. The Connecticut case would be within these authorities even were the benefits limited to persons who enlisted as a part of Connecticut's quota. On the other hand, it has been held within the legislative power to authorize bounties during the war to induce volunteers to enlist. *Booth v. Town of Woodbury*, 32 Conn. 118; *Speer v. School Directors, etc. of Blairsville*, 50 Pa. St. 150. *Cf. Trustees of Cass Township v. Dillon*, 16 Oh. St. 38. The reasoning seems to be that the latter subverts public ends by avoiding a possible indiscriminate draft, while the former has but a remote tendency to cause voluntary enlistment in the future. The opinion on the proposed statute in Massachusetts indicates a change in the attitude of that court. Though "a testimonial for meritorious service," such a gratuity would in fact be but an equalization of bounties, which the court had hitherto condemned. *Opinion of the Justices*, 190 Mass. 611, 77 N. E. 820. The legislative tendency toward private benefactions at public expense makes necessary the strict enforcement of the fundamental principle that taxation must be for a public purpose. See 12 HARV. L. REV. 316.

TORTS — CONTRIBUTORY NEGLIGENCE — STOP, LOOK, AND LISTEN RULE. — The plaintiff was injured at a crossing by one of the defendant's trains. He could have seen the train in time to stop had he looked before driving on the tracks. A verdict for the defendant was directed. *Held*, that such direction is proper. *Joyce v. West Jersey and Seashore R. Co.*, 83 Atl. 889 (N. J.).

The plaintiff's intestate, while crossing a highway, was killed by the defendant's automobile. The court refused to instruct that a pedestrian was under a duty to look sideways before crossing. *Held*, that the refusal was correct. *Adler v. Martin*, 59 So. 597 (Ala.).

The first case follows the Pennsylvania rule that a person about to cross a railroad is bound to use his eyes and ears in order to be considered free from contributory negligence. *Coppuck v. Philadelphia, etc. R. Co.*, 191 Pa. 172, 43 Atl. 70; *Pennsylvania R. Co. v. Richter*, 42 N. J. L. 180. But this view is nowhere supported when the plaintiff is only crossing a street. *Corona Coal and Iron Co. v. White*, 152 Ala. 413, 48 So. 362; *Barbour v. Shebor*, 58 So. (Ala.) 276. However, decisions holding a binding charge proper may be supported in either case if properly based on the general rule of law that where the facts plainly show contributory negligence, it is proper for the court to direct a verdict for the defendant. *Allen v. Boston and Maine R. Co.*, 197 Mass. 298, 83 N. E. 863. In many cases a failure to look and listen would be such obvious negligence as to warrant such direction. Most jurisdictions have found this adequate and have refused to make either railroad-crossing or highway cases an exception to the general rule. *Allyn v. Boston and Albany R. Co.*, 105 Mass. 77; *Beirne v. Lawrence, etc. Ry. Co.*, 197 Mass. 173, 83 N. E. 359. The hard and fast rule, it is submitted, arbitrarily makes the plaintiff's case more difficult than it justly should be. *Terre Haute and Indianapolis R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — APPLICATION TO COMPULSORY STATEMENTS OUT OF COURT. — The defendant was arrested for violating a statute providing that an operator of a motor vehicle who injures persons or property must give his name, residence, and license number to the

police. The Missouri constitution provides that "no person shall be compelled to testify against himself in a criminal cause." *Held*, that the statute is constitutional. *Ex parte Kneedler*, 147 S. W. 983 (Mo., Sup. Ct.).

For a discussion of the principles involved, see 24 HARV. L. REV. 570.

BOOK REVIEWS.

SEDGWICK ON DAMAGES. Ninth Edition, Revised, Rearranged, and Enlarged by Arthur G. Sedgwick and Joseph H. Beale. In four volumes. pp. xxxii, 3400. Baker, Voorhis and Company. 1912.

The ninth edition of Sedgwick on Damages will be welcomed as the satisfaction of a long-felt desire. It would be difficult to overestimate the importance of the improvements and additions to be found in the new edition, or to overpraise the scholarly thoroughness with which the reconstruction (for such it is) of this work has been made.

The eighth edition appeared more than twenty years ago, and was itself a reconstruction of the original treatise. It is fortunate that the skill and learning of the same editors were available for the preparation of the ninth edition, which is, in our opinion, the most scientific and complete book on the subject of Damages. It is not possible within reasonable limits to specify all the improvements in this edition, but a few of them may be mentioned by way of illustration of the character of the work.

Many of the courts of this country deny the right of action for damages consequent upon fright caused by negligence when there has been no bodily impact, some apparently on the ground that if such damages are allowed the courts will be kept too busy, others on the ground that such claims are too easily feigned. In Chapter II the editors have disposed of this erroneous doctrine by pointing out its origin in a misconception of the *dictum* of Lord Wensleydale in *Lynch v. Knight*¹ and also by an admirable discussion of the fundamental mistake in the reasoning of the courts which deny the right of action in this class of cases.

Chapter VII, on Proximate and Remote Damages, clears up in a satisfactory manner the confusion and uncertainty in the use of the words "consequential," "proximate," and "remote," and makes the legal distinction between "proximate" and "remote" a practical, not a logical one.

In this chapter occurs the only instance of difference of opinion between the two editors, who state in the preface that

"in reflecting on the extent of the field covered, it is a satisfaction to find that the most recent study of the subject by one editor is confirmed at every point but one by the conclusions of the other, while this point is one on which the courts have for fifty years been in conflict."

Mr. Sedgwick attempts to reconcile the early leading cases on the question whether negligent delay by a carrier is the legal cause of a loss consequent upon exposure to such operations of nature as are called acts of God or upon a risk excepted in the contract, and to show that the conflict on this subject in many succeeding cases is due to the mistaken idea that the decisions in the early cases were in conflict, and he declares himself in favor of the New York, and opposed to the Massachusetts, rule. Professor Beale dissents from this view "in every particular."² Such independence is quite refreshing, but we regret that Professor Beale did not add to the interest naturally excited by his candid statement of disagreement, by pointing out the errors of Mr. Sedgwick's view.

¹ 9 H. L. Cas. 577, 598.

² P. 207, n. 28.

At the beginning of Chapter VIII, on Natural Consequences, are several new sections setting forth with delightful clearness the true meaning of the word "natural," as applied to the consequences of a defendant's act, both in relation to the cause of action and the items of damage.

In Chapter X, on Avoidable Consequences, that doctrine is placed on the true ground of the responsibility of a plaintiff for consequential results of the defendant's act, which the plaintiff could have prevented by the exercise of reasonable efforts, and not upon any duty owed by the plaintiff to the defendant.

And in Chapter XI, a new and very valuable chapter on Replacement, the fundamental error of the substitution of the conception of a duty to replace for that of a resort to the cost of replacement as a measure of damages is pointed out, and the doctrine of higher intermediate value as a measure of damages in stock-carrying contracts is explained and appropriately limited.

The subject of Liquidated Damages has been one of the most confused and difficult parts of the law of damages, because of the practice of the courts of imputing to the parties an intention contrary to the fact, and inventing numerous canons of interpretation by which to arrive at this fictitious intention. Aided by recent cases in the Supreme Court of the United States and the House of Lords, the editors have succeeded, in Chapter XIII, in greatly clarifying the subject, and making it possible to hope that the courts may dispense with the "peculiar code of hermeneutics" which has introduced so much artificiality into this part of the law.

In Chapter XXXV an attempt is made to dissipate the confusion surrounding the cases of *Smith v. Bolles*³ and *Morse v. Hutchins*,⁴ and the cases which respectively follow these authorities, by reasoning that the measure of damages depends on the question whether the action is brought for breach of warranty (whether in *assumpsit* or in *tort*) or in *tort* for deceit. This reasoning is satisfactory when it is clear that the action is brought for breach of warranty or for deceit, but the real difficulty occurs where, forms of action being abolished, the plaintiff in his complaint or petition only states the facts, and such statement discloses both breach of warranty and false representations. In this case the plaintiff should be entitled to recover, at his election, either the value of his bargain lost by the breach of warranty, or the amount that he is out of pocket by reason of the deceit.

The book has also great value as a cyclopedia of cases, more than sixty thousand of which are cited. An instance of its practical value is to be found in Chapter LVIII, a new chapter on Excessive or Inadequate Damages, which contains a list which will be of great service to lawyers hunting for precedents to aid them on motions to set aside, increase, or reduce verdicts for excessive or inadequate damages, more than seventeen hundred cases being cited with the amount of the verdict and a brief note of the nature of the injury. Much time and ingenuity must have been devoted to the excellent condensation of the facts in these cases.

A new chapter on Conflict of Laws, short but comprehensive, concludes the book.

Confusion and conflict still exist in some branches of the law of Damages, but in the twenty years since the last edition of this book much progress has been made toward a better understanding of the principles and toward working out more harmonious and just rules. How this has been done, not by the legislatures, but by the judges since they have been freed from the fetters of the forms of action, is made clear by the editors in the preface, more than two thirds of which is devoted to the consideration of the reasons for the defective administration of justice in this country. This part of the preface is such an acute diagnosis of the causes of the evil, and so sound in its suggestions of remedies, that it is to be regretted that it should be buried in a place where it can be read by compar-

³ 132 U. S. 135.

⁴ 102 Mass. 439.

atively few persons. It ought to be republished in another form for the widest circulation, for it contains an impressive lesson to all of us, and particularly to those who, though justly discontented with the delays and failures of justice, study not the causes of the defects of which they complain, but, rushing blindly about in search of remedies, are allured by the *ignis fatuus* of the recall of the judges, that most futile and dangerous of all proposed remedies.

The recall of the judges will remedy nothing. It will only make things worse, for it will breed a class of judges with their eyes always on the weather-vane of popular favor, and so timid and vacillating that all fair-minded critics of the judiciary will be forced to admit that causes for dissatisfaction have become far greater and more real than before. What is really needed is not less, but more, independence in the judges. Instead of hampering them with technicalities of procedure, imposed upon them by the legislatures, and limiting their powers of control over juries, and now threatening them with the recall by popular vote, they ought to be released from the strait-jackets into which they have been put by most of the legislatures, and given a freer hand in the trial of cases both as to the juries and the lawyers. And, going down deeper into the root of the matter, the editors recognize, as do most experienced and thoughtful lawyers, although there are not many who have the courage to say it openly, that the quality of the judges could best be improved by abolishing the elective system, and returning to the system of appointment which prevails in England, in the federal courts, and in a few of our older states. But this is a counsel of perfection, which it seems useless to discuss in these times of excitement and wild appeals to popular prejudice. The editors wisely advise that "it will not do to wait until we can get a perfect tenure of office, and a better system of nominations and measure of judicial compensation than now exists," but that "the abuse as it exists in practice should be struck at without delay." And the simple modern English system of procedure is held up as a model. J. D. B.

AN ANALYSIS OF SALMOND'S JURISPRUDENCE. By Reginald E. de Beer, Solicitor. London: Stevens and Haynes. 1911. pp. x, 134.

This is another of the strange type of books which the English system of examination brings forth in such profusion. Its chief aim seems to be to enable students to take an examination in a book without reading it. The teacher of that none too teachable subject, jurisprudence, might find the book useful, however, as it is a careful and well-arranged summary of what is on the whole the best book available for instruction. R. P.

FOREIGN COMPANIES AND OTHER CORPORATIONS. By E. Hilton Young. Cambridge (England) University Press. 1912. pp. xii, 332.

This thoughtful and excellent book is divided into two parts: a scholarly consideration of the Juristic Person in Private International Law, and a consideration of the English law of foreign companies. The latter is somewhat inadequate perhaps, but the chief value of the book is the clear setting forth of the principal modern theories of juristic personality, of capacity, and of the domicile of corporations. The author strives to explain all the doctrines of the continental, English, and American writers and judges on these questions. It may perhaps be objected that he seems almost unaware of certain fundamental differences which make it impossible to find a single solution for the questions. Being familiar with the English practice of incorporating public and charitable societies, while business associations are registered only and not incorporated, he seems not to realize the necessity of distinguishing, with regard

to the question of personality, between the American corporation and the French *société anonyme*. In the same way he seems not quite to see that the view of capacity held by the common law differs from that held by the civil law. But the book is stimulating and suggestive, and we can only regret that so much of it is taken up with other people's opinions and so little with the clever views of the author.

J. H. B.

THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION. By Frederick N. Judson. Second Edition. Chicago: T. H. Flood & Co. 1912 pp. xxiv, 805. 8vo.

The first edition of Mr. Judson's work on this subject was reviewed in 9 HARV. L. REV. 398. To such an extent has the law of Interstate Commerce and its regulation been developed and expanded during the years since 1905, not only through judicial construction, but through far-reaching changes in statutory law, that a new edition of this work will be quite welcome to the legal profession. The first edition is enlarged by about three hundred pages. Of these some sixty additional pages are devoted to the general discussion of Interstate Commerce and the conflict between federal and state control.

A new chapter has been added dealing specifically with the Federal Power of Regulation in Interstate Commerce; also a special chapter upon the Federal Control of State Railroad Regulation. In this general discussion of the legal principles affecting the problems of Interstate Commerce Mr. Judson has dealt with his subject very satisfactorily, as much so as the limitations in space permitted. For an exhaustive treatment of these questions, however, the investigator will be still forced to look to the special works upon narrower phases of the subject.

There have been added brief discussions of The Hours of Service Act of 1907, The Twenty-Eight Hour Live Stock Transportation Law of 1906, and The Employers' Liability Act of 1906. The bulk of the additional space has, however, been devoted to a discussion of the amendments to the Interstate Act, as represented by the legislation of 1906 and 1910. The treatment by the author of §§ 1, 2, and 15 of the Act is particularly exhaustive and instructive. There has been omitted from the second edition the table of decisions of the Interstate Commerce Commission on the question of reasonableness of rates. Instead, this space has been devoted to the text of the Commerce Court Act, Interlocking Act, Ash Pan Act, Report of Accidents Act, so that the work now contains the text of all the important legislation respecting Interstate Commerce, as well as the Rules of Practice before the Commerce Court and the Commission, with forms of procedure before the latter. The result is an excellent reference work, of very practical arrangement, and prepared with much devotion to the subject.

J. M. B., JR.

THE SUPREME COURT AND THE CONSTITUTION. By Charles A. Beard. New York: The MacMillan Company. 1912. pp. vii, 127.

THE INHERITANCE TAX LAW. By Arthur W. Blakemore and Hugh Bancroft. Boston: The Boston Book Company. 1912. pp. iv, 1336.

LAW OF CONTRACT. Second Edition. By William T. Brantly. Baltimore: M. Curlander. 1912. pp. xv, 560.

A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS, AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY. By various European Authors. With an editorial preface by John H. Wigmore, and introductions by Oliver W. Holmes and Edward Jenks. Boston: Little, Brown and Company. 1912. pp. liii, 754.

- POWER OF FEDERAL JUDICIARY OVER LEGISLATION. By J. Hampden Dougherty. New York: G. P. Putnam's Sons. 1912. pp. viii, 125.
- THE LAWS OF ENGLAND. Volumes XX, XXI. By the Right Honorable the Earl of Halsbury and other lawyers. London: Butterworth and Company. Rochester, N. Y.: The Lawyers' Coöperative Publishing Company. 1912. pp. cci, 763, 63; ccxxviii, 867, 68.
- PRINCIPLES OF THE CRIMINAL LAW. Twelfth Edition. By Wyman F. Harris. Edited by Charles L. Attenborough. London: Stevens and Haynes. 1912. pp. xl, 613.
- WAR AND THE PRIVATE CITIZEN. By A. Pearce Higgins. London: P. S. King and Son. 1912. pp. xi, 192.
- WHICH CHARTER? By Francis Bacon James. Washington: Trade and Transportation Bureau. 1912. pp. 31.
- A SHORT HISTORY OF ENGLISH LAW. From the earliest times to the end of the year 1911. By Edward Jenks. Boston: Little, Brown and Company. 1912. pp. xxxviii, 390.
- DAS PROBLEM DES NATÜRLICHEN RECHTS. By Erich Jung. Leipzig: Duncker and Humblot. 1912. pp. 335.
- A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS. By Arthur K. Kuhn. Columbia University Studies. New York: Longmans, Green and Company. 1912. pp. 173.
- LA SECONDE CONFÉRENCE DE LA PAIX. By Ernest Lemonon. Preface by M. Léon Bourgeois. Paris: Librairie Générale de Droit et de Jurisprudence. 1912. pp. iv, 770.
- DAS GEMEINE RECHT ENGLAND'S UND NORD AMERIKA'S. By O. W. Holmes, Jr. Translated by Rudolph Leonhard. Leipzig: Duncker and Humblot. 1912. pp. xix, 423.
- THE COURTS, THE CONSTITUTION AND PARTIES. By Andrew C. McLaughlin. Chicago: University of Chicago Press. 1912. pp. vii, 299.
- LAWYERS' MERRIMENTS. By David Murray. Glasgow, Scotland: James MacLehose and Sons. 1912. pp. vii, 302.
- MAJORITY RULE AND THE JUDICIARY. By William L. Ransom. With an introduction by Theodore Roosevelt. New York: Charles Scribner's Sons. 1912. pp. xx, 177.
- THE LAW OF TORTS. Third Edition. By John W. Salmond. London: Stevens and Haynes. 1912. pp. xxx, 548.
- A SUMMARY OF THE LAW OF TORTS. By John W. Salmond. London: Stevens and Haynes. 1912. pp. xxii, 320.
- SELDEN SOCIETY. Year Book of Edward II. Volume VII. The Eyre of Kent, 6 & 7 Edward II. Edited for the Selden Society by the late Frederick William Maitland, the late Leveson William Vernon Harcourt, and William Craddock Bolland. London: Bernard Quaritch, 11 Grafton Street, West. 1912. pp. li, 264.
- PROBLEMS OF THE ROMAN CRIMINAL LAW. By James Leigh Strachan-Davidson. Oxford University Press. London: Henry Frowde. In two volumes. 1912. pp. xxi, 245, 287.
- HANDBOOK OF THE LAWS OF BANKS AND BANKING. By Francis B. Tiffany. St. Paul: West Publishing Company. 1912. pp. xi, 669.
- THE LAW OF NEGOTIABLE SECURITIES. Third Edition. By William Willis. Edited by Joseph Hurst. London: Stevens and Haynes. 1912. pp. xv, 211.

HARVARD LAW REVIEW.

VOL. XXVI.

DECEMBER, 1912.

No. 2.

THE OPERATION OF THE REFORMED EQUITY PROCEDURE IN ENGLAND.¹

1. **W**HAT is the practical benefit resulting from the adoption of a single form of action in law and equity cases?

In former times a litigant at common law had first of all to select his form of action. He had sixty or seventy to choose from, but his success or failure entirely depended on the choice he made. If he chose trespass and did not bring his case within the rules relating to that form of action, it availed him nothing that he clearly would have succeeded had he chosen another form of action. Such a state of things was not conducive to the proper administration of justice. On the other hand, a litigant in equity merely presented a petition stating the facts on which he relied and asking generally for such relief as he might be entitled to in equity, and the respondent was obliged to answer on oath; but both petition and answer had become enormously prolix. Further, courts of law

¹ On November 4, 1912, the Supreme Court of the United States promulgated a set of rules which will change radically the procedure in equity suits in the federal courts. In connection with his work as a member of the committee, Mr. Justice Lurton had occasion to consult with Lord Loreburn, at that time Lord Chancellor of England, as to the operation of the reformed equity procedure introduced by the Judicature Acts in England. Subsequently the Lord Chancellor reduced part of what he had said to writing, in answer to certain leading questions propounded to him by Mr. Justice Lurton. The questions and answers are here given.

were supposed to know nothing of and ignored equitable doctrines, and on the other hand the court of chancery was unable to grant relief in cases within the competence of the common-law courts. And, once again, the court of chancery granted relief of a nature unknown to the common law and refused to grant relief appropriate to actions at law. The result of this was that the litigant really entitled to relief too often failed to obtain it because he instituted proceedings by an inappropriate form of action or in the wrong court, and that a litigant too often could not obtain full relief without instituting proceedings both at common law and in the court of chancery. A person entitled to land might fail to recover it at law because his interest was equitable, or in equity because his interest was legal, or might be unable to recover it at law without first obtaining discovery of his opponents' documents, which he could only do by suit in equity. And, again, a sufferer from nuisance might have to go to law for damages and to equity for an injunction. All this involved uncertainty, useless expense, and great delay. From time to time various mitigations of this really intolerable evil were introduced by statute, but they were partial and left the grievance in the main unredressed. At last by the Judicature Act of 1873 a complete remedy was provided by the simple enactment that all the judges of the High Court should have jurisdiction both in law and equity. If an action is commenced at law which is really appropriate to be tried in a court accustomed to administer equity, it can be transferred and proceed as if it had been commenced in equity, and *vice versa*. And in any case, if any point emerges, the judge has full jurisdiction to apply either principles as the justice of the case requires. No one has ever doubted the wisdom of this change, and its practical benefit is simply that a litigant can no longer be tossed about from one of the king's courts to another, at great cost, and with needless delay, upon grounds which have no justification of utility or public policy. It used to be just as if a surgeon, when called in to a patient, were forbidden to give any medicine or afford any relief except it were surgical.

Corresponding to this provision for fusing the jurisdictions in law and equity another provision was made by which the pleadings of both sides were assimilated. Instead of the old technical forms of pleading which no layman could possibly understand and

which were in use in courts of law, and instead of the infinitely prolix proceeding of bill and answer, which prevailed in equity, a new form of pleading was set up for both sides. It is described in the statutes and rules, and amounts to this: each party must state in writing as shortly as he can what his claim is and how it arises, or in the same way what his defense is and his reply. He must not enter upon any evidence and must not state his case in an embarrassing way. What is required is clearness, brevity, and simplicity, though in fact these virtues are not always present in the pleadings. Either party may be ordered to give further particulars in order to make things plain.

(It may be worth while for Mr. Justice Lurton and his coadjutors to consider the Scottish method of pleading, which, in my opinion, is the best.)

2. May a demurrer and defense upon the merits be combined in one pleading? If so, how has the pleading and practice operated?

Yes. A litigant may state in his defense what facts he relies upon, and at the same time may state that he contends that even if the facts be as alleged by the plaintiff, yet they furnish no cause of action. That is in effect a demurrer. There is no doubt that this practice is beneficial. It may be convenient that the question of law decided by the demurrer should be decided first, and if decided in favor of the defendant it will end the case, unless the plaintiff is allowed to amend and raise a fresh contention. It may be, and generally is, convenient first to ascertain all the facts at a trial, and then to apply the law or equity, as the case may be. Which course is to be taken is usually agreed to by the parties, but, if not agreed, the judge can direct what is to be done. We find it very useful to have as much elasticity as possible in these things, and I am sure no one doubts that all relevant contentions both of fact and law ought to be stated in the pleadings.

3. When is a defense due after the filing of the plaintiff's claim; and what are the methods for obviating delay in coming to an issue?

The normal time is as follows: an action begins with a writ, upon which the character of the claim (for example, money lent, damages for false representation, injunction against infringement of a patent) is quite shortly indorsed.

An appearance must be entered by the defendant at the proper office within eight days.

As soon as the appearance is entered the plaintiff is now bound to issue a summons for directions. This summons deals with all the points of practice likely to arise during the proceedings, and, for example, whether there shall be pleadings, for some cases are considered so simple that pleadings can be dispensed with. Thus an action for nuisance by noise may well be tried without pleadings, the issue of fact being sufficiently apparent from the indorsement of the writ. In the normal case, however, the master will on the summons for directions order pleadings fixing the times for delivery of statement of claim and defense according to the nature of the action. This summons also deals with questions of discovery and other methods which it may or may not be possible to dispose of in advance. If it be impossible, as is often the case with discovery, the issues not being yet defined, the summons is from time to time adjourned, being restored when desirable by either side on notice, so that the cost of a separate summons on each point is avoided. Any time fixed by the master can be enlarged if the justice of the case so requires.

The plaintiff must within the time ordered by the master deliver his statement of claim, setting forth the substance of his case without prolixity but with sufficient fullness. If he does not do this then the defendant may apply to have the action dismissed with costs for want of prosecution.

After the statement of claim has been delivered the defendant must deliver his answer or defense within the time limited by the master. If he does not do this within the proper time the plaintiff may sign judgment in his own favor at the proper office, or obtain from a judge the appropriate relief as in an undefended action.

It will thus be seen that a litigant can always make his adversary proceed with due diligence. It will be observed that the penalties for delay are somewhat summary and severe. This is, I think, necessary in order to defeat tactics or procrastination; but it is rendered safe by the power conferred upon judges and masters

to extend the time for any step in an action if a good ground is made for it, and by the power to set aside any judgment signed by default whenever it is right to do so. In this way, extensions of time are usually agreed between the parties, and no one ever suffers for mere oversight or even for neglect which is not wilful. A judgment by default for some error or carelessness is always set aside on terms as to costs and as to future diligence. In practice this system works extremely well, and it is seldom that any solicitor tries to snap a judgment, because he knows that he will really gain nothing by so doing. But if there is any ground for thinking that unfair procrastination is intended, a peremptory order fixing dates for this or that stage can be and, in proper cases, will be made.

4. What are the functions of referees? And in actual practice is it usual to refer questions of fact and law not in the nature of an account to such referees?

There are official referees, who are permanent officers of the court, and special referees may be appointed to hear a particular case or report on any issue of fact. Speaking broadly, the court has a very wide discretion to refer to them either a case as a whole or any issue in or part of a case whenever there is an account to be taken or some prolonged technical or scientific investigation to be made, or some complicated inquiry or matter more fit for local investigation. It is not practicable to define with accuracy the boundary line beyond which a reference will not be made, but it would be wrong to refer compulsorily any matter which could be conveniently tried in court and involves serious controversy as to the main issues in a case. Judges do not in practice relieve their court of irksome cases by so referring them. It is not done unless there is a good deal of detail, and of a kind which does not require the personal attention of the judge in actually hearing the evidence. The procedure by way of appeal from an official or special referee varies according to whether the court has referred the whole action for trial or has referred a particular issue for report. In the former case, speaking generally, the referee's decision is reviewed only on some point of law. In the latter case, the court may adopt or reject the report, or remit it to the referee for further inquiry or explanation. If it appears on the report that the referee has made

a mistake in law, this, of course, will be put right by the judge; but if a point of law arises, the referee can, and usually would, in his report, state his finding of the fact and how the point of law arises and how he thinks it ought to be decided. Or he might set out the true facts and say that if the point of law be decided one way the result would be judgment for the plaintiff, and, if decided the other way, judgment for the defendant, or partly for one and partly for the other, and so leave the court to pronounce what is the proper conclusion. A pure question of law would never be referred. It is only referred when it depends upon the facts, as yet unascertained, whether or not a point of law arises and how it should be determined.

5. How does the practice of hearing evidence orally in equity cases operate?

In answering this question a distinction must be drawn between hostile litigation and cases which ultimately turn on questions of the construction of documents or the proper mode of executing trusts or administering estates. With reference to the latter, the rules of the Supreme Court have prescribed a special mode of procedure which is initiated by originating summons entitled in the matter of the instrument requiring to be construed, or in the matter of the trusts or of the estate requiring to be executed or administered. In this class of proceedings evidence is usually taken by affidavit, though on particular issues of fact where there is really considerable controversy the judge will direct the issue to be tried on oral evidence as being the mode of trial by which the truth can be most surely ascertained. Where, however, the litigation is hostile or involves questions of character or breach of trust, procedure by originating summons is inapplicable, and the proceedings must be initiated in the normal way by writ of summons. Every action so instituted must, unless the parties otherwise agree, be tried orally, even though it be of such a nature that prior to the Judicature Acts it would have been within the exclusive jurisdiction of the court of chancery.

It is now fully recognized in England that a judge is far more likely to ascertain the truth if he sees and hears the witnesses himself, and can watch the course of the evidence, observe the de-

meanor of the witnesses, and form his own opinion of their intelligence, observation, and credibility. In our courts of appeal this is universally recognized, and it is only with reluctance and upon a clear conclusion that a court of appeal will differ with the opinion of the judge who has had these advantages. Upon the question of comparative cost I believe the system of requiring oral evidence before the court itself is upon the whole cheaper, because the real points of difference emerge at the trial; whereas, if all the evidence is taken by affidavit or by private examination of witnesses beforehand, the counsel preparing the affidavit or examining the witnesses will not know so well what is the real field of controversy, and is apt to cover the whole ground of possible criticism or objection with each witness, so as not to be taken by surprise at the hearing.

Further, if there be any controversy as to facts, cross-examination is necessary, and the examiner before whom this takes place has not the authority possessed by the judge of confining the cross-examination within proper limits, so that a great deal of time is wasted and expense incurred, which could have been avoided had the whole evidence been taken orally in the first instance before the judge. However the matter may be as to costs, I am sure that the practice of hearing evidence orally is incomparably better in all ways for that which is the main purpose, namely, the ascertainment of truth.

6. To what extent do parties actually agree to take testimony by deposition, thus obviating oral testimony?

They do so largely, and indeed generally, in matters of formal proof, and often where they do not greatly differ upon the facts and think their differences are not of considerable importance, or where the cost of oral evidence is out of proportion to the matter at stake. Often they dispense with proof upon particular issues altogether by agreeing upon written admissions of fact which are binding as between themselves upon the trial. I am not aware of any general practice to use depositions upon a large scale in cases where there are real and important controversies as to fact. If the witnesses, however, are abroad or unable to attend, their depositions are often taken by consent, and may be so taken, even without consent, by order of the court.

7. Mr. Griffith in his comment upon the rule in respect to oral evidence predicted that the practice of taking the evidence orally in open court in equity cases would necessitate an increase in the judicial staff. Has this been verified?

Certainly not in my opinion. Whatever increase there has been in the judicial staff during the last thirty years has been due to the increase of commerce and population. I have never heard it suggested that it was due to the practice of taking oral evidence. I think Mr. Griffith's prophecy must be numbered among the numerous forebodings of evil which are the inevitable accompaniment in this country of any effort to obtain law reform.

8. What is the practice of obtaining a discovery or the production of books or documents in a legal action?

It is the same both for actions in law and in equity. Either party to the suit can obtain an order for discovery of documents relevant to the case of the adversary, but a fishing discovery — that is to say, discovery in order to enable the applicant to fish for a cause of action when he has no materials of his own — is disallowed. It must always be a matter for decision upon the circumstances in each case whether it is a fishing application or not. There are numerous decisions illustrating the way in which this rule works. Normally each party must disclose the documents relevant to his opponent's case which are or have been in his custody or control, and make an affidavit that there are no others. He may put in a separate schedule to the affidavit, such of them as he claims to be privileged from inspection. Then his adversary can obtain inspection of such as the judge thinks are not privileged.

9. How is a case made up for appeal, and what methods are adopted for shortening the transcript?

The method is different for the Court of Appeal and the House of Lords, to which an appeal from the Court of Appeal is allowed.

In the Court of Appeal, where there is a great deal of business, including many small cases and many purely interlocutory appeals, a case is not, as a rule, formally made up at all. Copies of the

pleadings and of the documents, and transcripts of the evidence if there has been a transcript made, are furnished to each of the judges. If there has been no transcript, then the evidence is gathered from the trial judge's note or from the notes or recollection of counsel. Each of these pieces, namely, pleadings, documents, and evidence, is separate; no attempt is, as a rule, made to make up a case, and the material is used as it would be on a hearing in the court of first instance. Sometimes, of course, in heavy cases all these materials are printed, but this is where they have been printed in the court of first instance for the convenience of parties.

In the House of Lords it is quite different. The proceeding commences with a petition to the king in Parliament. Then each side has to deliver a statement (called the appellant's or respondent's case), in which they recapitulate what is the nature of the dispute and the history of it in the courts below, and then state their reasons for impugning or sustaining the decision of the Court of Appeal. Following this is a print in clear type of all the pleadings, documents, and evidence, together with the judgment in the courts below, gathered together in one appendix. The parties will omit any matter which is irrelevant, or if one will not agree, the Lords, sitting in a judicial committee, will direct it to be done. All this is bound up in a book.

There is no doubt that the House of Lords has a great advantage in that all the materials for adjudication are presented to it in clear print and in one or more volumes. It helps very greatly to concentrate attention upon the material points. At the same time it is a little expensive in the smaller cases. Notwithstanding these advantages I should not advocate such a method being enforced in the Court of Appeal, because of the multiplicity of cases there heard and the small amount at stake in many of them. But where expense is unimportant it is far the best method.

(The above answers relate to cases in law and equity, but not to admiralty or probate or divorce cases. There is really not very much difference, but I have confined my answers to cases in law and equity.)

THE POLITICAL CAUSES WHICH SHAPED THE STATUTE OF USES.

I.

THAT the fiscal needs of Henry VIII had much to do with the passing of the Statute of Uses, that Henry had great difficulty in inducing Parliament to pass it, and that the Statute when passed was very unpopular, are ascertained facts of our legal history. Owing to the absence of the journals of Henry's Parliaments there is no direct evidence of the manner in which the Statute was pioneered through Parliament in 1535-36. But from other sources we have evidence of the failure of Henry's earlier attempts to restore his feudal revenue, and at the same time to settle the problem of the use. I hope to show in this paper that the Statute of Uses did not represent Henry's original scheme, but that it was the result of a compromise with one of the parties in the House of Commons which had successfully opposed that scheme; and that, like many other important statutes, its form was largely determined by the necessity of conciliating a strong parliamentary opposition.

Some years before the passing of the Statute of Uses fiscal necessities had led Henry VIII to reflect upon the depletion of his feudal revenue. Loans and benevolences meant the complete loss of a personal popularity, which the divorce proceedings and the threatened legislation against the church were beginning to imperil. Though he was able, partly by persuasion and partly by diplomatic pressure, to induce Parliament to further his ecclesiastical policy and his matrimonial schemes, he could not induce it to vote him a permanently adequate supply. Under these circumstances the restoration of his feudal revenue, which after all was his own property, appeared to Henry's legal mind as the most promising source from which a permanent increase in the royal revenue might be drawn.

Henry's attention, therefore, was directed to the land law; and in the land law he could not but see much that displeased him; for it was at once the most highly developed and the most irrational

part of the common law.¹ He did not hesitate to propose to make in it changes of the same drastic character as those which he was making in other branches of the law.

In 1529 two measures were drawn up to be submitted to Parliament.

The first² was a draft bill which, if it had been carried, would have at once revolutionized and simplified the law. It began by reciting the "grate trobull, vexacion, and unquietness amonges the kynges suggesttes . . . for tytyll of londes, tenements, and other heriditamentes . . . as well by intayle as by uses and forgyng of false evidence." It went on to provide the following drastic remedies: (1) All entails were to be abolished and none were to be permitted for the future, "so that all manner of possessions be in state of fee simple from this day forward for ever."³ (2) No uses of any land were to be valid, "onles the same use be recordid in the kynges courte of the commen place."⁴ A special officer of the court was to be deputed to keep a separate roll for each shire, and he was to charge certain fees for keeping the roll.⁵ (3) To avoid the risk of forgery, all purchasers were required, so soon as the deed of conveyance was sealed and livery of seisin made, to have the deed openly read in the parish church or churches where the land was situate, "att suche tyme as moste people be present." The priest was to "fyrme the said deede"; and it was to be registered "in the schere towne in which the land lay."⁶ (4) All lands of which recoveries had already been suffered or fines levied were, after the lapse of five years, to be held in fee simple by those in whose favor the recovery had been suffered or the fine levied;⁷ and all seised of lands of which they or their ancestors had been peaceably seised for forty years without claim made were to have an indefeasible title.⁸ (5) Entails were still to be permitted, "to the nobyll men off thys realme being within the degree of a baron"; and no one was to buy such noblemen's land without the king's license.⁹ If such license were given, the deed must comply with

¹ Holdsworth, 2 History of English Law 501, 502.

² Letters and Papers, Henry VIII, vol. 56, ff. 36-39, calendared Letters and Papers, Henry VIII, IV, No. 6043 (b); printed below, p. 122, and referred to hereafter as No. I.

³ No. I, § 2.

⁴ *Id.*, § 3.

⁷ *Id.*, § 7.

⁵ *Id.*, § 3.

⁸ *Id.*, § 8.

⁶ *Id.*, § 4.

⁹ *Id.*, § 5.

the formalities required for ordinary conveyances, and the purchaser was to hold in fee simple.¹⁰

This measure proposed to give considerable privileges to the nobility. In return the nobility were prepared to concede something to the king. Their concessions form the second of these two measures. They are contained in twenty-three elaborate articles which, having been agreed upon by the king and the nobility, were to be laid before Parliament for its sanction.¹¹

Under these articles the king was to have the wardship of the lands of all his tenants holding of him for an estate of inheritance by knight service in chief and leaving an infant heir (excepting only the fees of the Archbishop of Canterbury and the Bishop of Durham between Tyne and Tees), whether the tenant had the use or the legal estate.¹² If the land was devised or otherwise settled the king was to have the wardship of a third (notwithstanding such devise or settlement) from the lands so devised or otherwise settled;¹³ but with a saving for the rights of tenants under existing settlements.¹⁴ If part was devised or otherwise settled, and part not, the king was to elect whether he would take the part not devised or settled, or whether he would take the third.¹⁵ If the land held of the king by knight service in chief did not amount to a third of all the tenant's lands, and he devised or otherwise settled all his other lands, the king was to have the wardship of the lands held in chief and of so much of the other lands as would amount to a third of all his lands.¹⁶ Any estate coming to the ward from his ancestor who held of the king, by reason of the expiration of a particular estate, was to be held by the king, unless otherwise settled.¹⁷ The same rules were to apply to lands held of the king by reason of any escheat, honor or otherwise, and not in chief.¹⁸ On suing out livery the king was to be entitled to a whole year's profits of a third of the land;¹⁹ and specific rules were made as to the time for suing

¹⁰ No. 1, §§ 5 and 6; the latter section seems to be designed to make it clear that these lands are from henceforth to be held in fee simple.

¹¹ Cotton MSS. Titus B. 4, ff. 114 (125)-118 (125), calendared Letters and Papers, Henry VIII, IV, No. 6044.

¹² *Id.*, Articles 1, 2, and 20.

¹³ *Id.*, Article 21.

¹⁴ *Id.*, Article 5.

¹⁷ *Id.*, Article 6.

¹⁵ *Id.*, Articles 3 and 20.

¹⁶ *Id.*, Article 4.

¹⁸ *Id.*, Article 7.

¹⁹ *Id.*, Article 8; under the existing rule the king took half a year's profits of all the land.

out livery of estates in possession and reversion.²⁰ Heirs of full age were to pay half a year's profits as before.²¹ It was provided that recoveries to secure jointures or settlements of the land were to be permitted as before, and should have the same effect.²² Mesne lords were to have the same advantages as the king;²³ and these rules were to apply to *Gard pur cause de gard*.²⁴ Neither the king nor any other lord was to have any right of marriage in respect of persons ("being of the full age of consent") married in the ancestor's life.²⁵

It was provided that no tenant in chief should make any gift in tail or to any other use, or do any other thing whereby the king should be excluded from any profit of ward, primer seisin, or livery contrary to the effect of this agreement; and that

"if any other imaginacion or invencion hereafter shall be found contrived or devised contrarie to the same, yet that, or any such thinge notwithstandinge, the kinge's heighnes, his heirs and successors, shall have the full benefitte and effect of his wardship of the bodyes and landes, and of premier seisons, and liveries accordinge to the plaine and true intent of the said Articles and every of them."²⁶

Conversely it was provided that,

"if at any time hereafter imaginacion devise or invencion shall be found or contrived for the kinge's heighnes . . . whereby it shall be pretended that any larger or more profits or advantages concerninge his . . . wardships, premier seasons, or liveries should or might grow to the kinge's heighnes . . . than by the plaine or true meaninge declared by the Articles above written is limited or appointed, yet, that notwithstandinge, the kinge's heighnes is contented that it shall be enacted that his Grace . . . shalbe pleased to accept and take the benefitts and profitts before limited by the said Articles, and none other more or larger."²⁷

²⁰ Cotton MSS., *supra*, Articles 8-13, 23.

²¹ *Id.*, Article 12.

²² *Id.*, Articles 16 and 17.

²³ *Id.*, Article 19.

²⁴ *Id.*, Article 22; *gard pur cause de gard* arises where there is lord, mesne, and tenant, and the mesne is in ward to the lord, and the tenant dies leaving an infant heir, — in that case the infant heir is in ward of the lord *pur cause de gard*, see 43 Ass. pl. 15; Plowden, 334; Rolle, *Ab. tit. Garde B.* 20, 25.

²⁵ *Id.*, Article 22.

²⁶ *Id.*, Article 14; for the manner in which a gift in tail might defeat wardship, see Bingham's Case, 2 Co. Rep. (1598-1600), at pp. 91 b, 92 a.

²⁷ *Id.*, Article 15.

In the event of the death of any of the signatories of these articles before they were enacted by Parliament, the articles were to be binding upon their heirs.²⁸

Henry might make a bargain with his nobility; but it was quite another matter to induce the House of Commons to ratify it. The large landowners, under the degree of barons, saw themselves deprived of the power of making secure family settlements and secret conveyances. The lawyers saw themselves deprived of a large amount of profitable business. It is not surprising therefore that measures which roused the hostility of the two most powerful interests in the House of Commons came to nothing.²⁹

But the need for money was pressing; and Henry was determined. In the Parliament of 1532 he was again pressing his proposals. But apparently he only succeeded in arousing a more determined opposition; for Chapuys relates that the royal demands "had been the occasion of strange words against the king and council."³⁰ It was clearly impossible to carry the original scheme through the House of Commons. The alliance between the king and his nobility had been found to be useless for this purpose. There must be a new scheme founded on a new alliance between the king and one of the interests in the House of Commons which had blocked the original scheme.

There could be little doubt which of these interests it would be the most easy to win. It was not likely that the landowners would ever consent to any scheme which would deprive them of the power of making secure family settlements and secret conveyances. On the other hand the lawyers, and probably other classes in the community, were prepared to admit that uses often furthered fraudulent dealing. Both the preamble to Richard III's statute,³¹ and "The

²⁸ Cotton MSS., *supra*, Article 18.

²⁹ For the large influence which the lawyers had in the House of Commons see an article in 12 COL. L. REV. 16-18, 25, by the present writer.

³⁰ Letters and Papers, V, No. 805. Chapuys relates that the king was trying to get from Parliament a third of the feudal property of deceased persons, but that he had not succeeded, and that the demand had been the occasion of strange words against the king and council; *id.*, No. 762, he relates that the question whether the king should have the goods of all lords who die, even when they leave a son of full age, had been discussed in Parliament; *id.*, No. 989, he says, "the king has again referred to Parliament the rights he wishes to have on inheritances, but Parliament will not agree to it."

³¹ 1 Richard III, c. 1; *cf.* Holdsworth, 2 History of English Law 403, n. 6.

Replication of a Serjeant to the Doctor and Student,"³² show that this feeling existed.³³ Probably the perception of the common lawyers was quickened by their professional jealousy of the Chancery. Many of them no doubt would have liked to capture for their own courts jurisdiction over this new form of property, which was making the fortune of the new court of Chancery; and the new theory which at this time was beginning to make its appearance in the law courts that uses were known to and recognized by the common law³⁴ is perhaps evidence of this desire, — "The wish was father to the thought." Clearly there was a possibility of drawing a measure which would both give the king what he wanted and command the approval of the lawyers.

The way in which the king went to work was characteristic of his diplomatic methods. He frightened the landowners by the stringency of his inquiries into settlements which deprived him of his rights;³⁵ and he frightened the lawyers by listening to a petition

³² Hargrave, *Law Tracts*, 323-331; the full title is, "A Replication of a Serjaunte at the Lawes of England to certaine Pointes alleaged by a Student of the said Lawes of England in a Dialogue in Englishe between a Doctor of Divinitye and the said Student."

³³ "They [uses] began of an untrue and crafte invention to put the king and his subjects from that which they ought to have of righte by the good true common lawe of the realme; as the kinge's highnes from his escheats, his wardes, and his primer seaisins . . . and his subjects from their escheats and wardes, women from their dowers, and husbandes of such women that be inheritours from their tenures by the curtesie of England . . . And those that have good right and tytyle to any land to recover it by action after the course of the common lawe be put from their actions. . . . By soche uses the good common lawe of the realme . . . is subverted and made as voyde, so that none of the saide subjects can be and stand in anie surety of any possession," *id.* 328, 329; the remarks made by Lord Ellesmere upon the fraud rendered possible by Henry VIII's Statute of Wills show that there was some ground for the views expressed in the preamble to the Statute of Uses; Hudson, *Star Chamber*, 69, tells us that he said that the Statute of Wills "was not only the ruin of ancient families, but the nurse of forgeries, for that, by colour of making wills, men's lands were conveyed in the extremity of their sickness, when they had no power of disposing of them."

³⁴ Holdsworth, 2 *History of English Law* 505; from this the conclusion was sometimes drawn that the incidents of the estate of the *cestui que use* should follow closely all the incidents of the legal estate, *Y. B. 27 Henry VIII, Pasch. pl. 22, per Horewood and Pollard, arg.*; Anderson, C. J., *Corbet's Case*, 2 *And.* (1599) at pp. 142, 143, showed that this view was a fallacy; the arguments, he shows, are "*illusions à igno-rants et rien a le purpose d'estre mises a prover use all Commen Ley*"; and Bacon, *Reading on the Statute of Uses* (7 Works, ed. Spedding, 402), concurs.

³⁵ See *Letters and Papers*, VII, No. 383 (1534). Cromwell writes to the sheriff of Yorkshire that, being informed of the death of Sir J. Denham, who held lands *in capite* of the king, the council think that, in order to prevent the king's rights from

against abuses in the administration of the law.³⁶ This petition was addressed to the king and the lords spiritual and temporal because

"soo many lerned men [*i. e.*, lawyers] byn rulers in your commen house ayenst whome noo man ther dar ne may make eason [*sic*] in any cause ayenst their advayles or profetts."

It complained of the delays in the law, and the quibbles raised by the lawyers for the defense of untrue titles; the heavy fees which they demanded;³⁷ the difficulty in getting judgments executed owing to the bribery of undersheriffs, and the misconduct of attorneys and juries. It pointed out that, in consequence, persons were compelled "for vearly povertie to sue to your grace by petition whereby your grace and counsaill are molested and troubled." It prayed, in conclusion, that statutes should be enacted to expedite causes, and to fix the fees of counsel, attorneys, and sheriffs.

As usual Henry's diplomacy was successful.

II.

In 1535-36, two years after the presentation of the petition against abuses in the administration of the law, a list of grievances suffered by the realm from uses,³⁸ three draft bills concerning uses and wills,³⁹ and one draft bill concerning the enrolment of covenants, contracts, bargains, or agreements made with reference to

being cloaked, the persons to inquire for the king should be resident near the lands; the names of suitable persons are enclosed; the case reported in Y. B. 27 Henry VIII, Pasch. pl. 22, affords another illustration.

³⁶ State Papers, Henry VIII, Q. f. 138 (31), calendared Letters and Papers, Henry VIII, VII, No. 1611 (3) (1534).

³⁷ "Nother sergeauntes nor apprenticis woll for the preferment of theyr clyauntes cause goo . . . barre at any tyme afor your Justices without the fee of iijs. iiijd. to theym be gevyn for . . . every tyme soo goyng, whiche in sundry termes considering the manyfold dilayes nowe used. . . . Thurre undoyng and distruction of a poore man"; the manuscript is defective, but the sense is plain, the records contained in Plowden's or Coke's Reports, which set out the numerous adjournments from term to term, bear out the justice of this complaint.

³⁸ Letters and Papers, Henry VIII, vol. 101, f. 282, calendared Letters and Papers, Henry VIII, X, No. 246 (3); printed below, p. 123, and referred to hereafter as No. II.

³⁹ Letters and Papers, Henry VIII, vol. 101, ff. 252, 261 *et seq.*, 286, calendared Letters and Papers, Henry VIII, X, Nos. 246 (1), (2), (4). The draft bill in Letters and Papers, f. 286, calendared Letters and Papers, X, No. 246 (4), is printed below, p. 126, and is referred to hereafter as No. III.

the uses of lands,⁴⁰ were before Parliament. It was from this material that the Statute of Uses, and the statute supplemental to it,⁴¹ concerning enrolments of bargains and sales, finally emerged.

The list of grievances suffered by the realm from uses is long and detailed. It is written in two hands and there is a certain amount of repetition.⁴² In some cases it gives particular instances of inconveniences suffered;⁴³ and at the end there is a summary statement of the various fraudulent purposes which uses had been made to serve.⁴⁴ The writers insist much on the disadvantages of uses from the point of view of the *cestui que use*, of the public at large, of the king and lords, and of the law. The *cestui que use* is at the mercy of a fraudulent bailiff or feoffee; nor can he take action against a trespasser. He loses his curtesy, and his wife her dower. The king loses his forfeitures, and king and lords lose their incidents of tenure. The public at large is defrauded because no man can tell against whom to bring his action, nor is anyone secure in his purchase. The law is wholly uncertain — “the openyons of the Justices do chaunge dely apoun the suertyez for landes in use.”⁴⁵ The use is, “but the shadowe of the thyng and not the thyng indeyd.”⁴⁶ It causes the law to be double, and to sever the real from the apparent ownership, “which is a grett disseytt.”⁴⁷

“Where per case some one man takyth esyngler welth their be a hundrioth against one that takyth hurt and losse theirby, is yt a good law ” ?⁴⁸

⁴⁰ Letters and Papers, Henry VIII, vol. 101, f. 303, calendared Letters and Papers, Henry VIII, X, No. 246 (6).

⁴¹ The draft bill is far more elaborate than the Statute of Enrolments actually passed, — 27 Henry VIII, c. 16. But it is quite clear that both the draft bill and the actual statute were integral parts of Henry's scheme for dealing with uses. The Statute of Enrolments was certainly not, as is sometimes stated (*e. g.*, Jenks, *Short History of English Law*, 121), a statute passed in a hurry to supply an unforeseen defect in the Statute of Uses. It is really, as Bacon pointed out in his Reading on the Statute of Uses (7 Works of Francis Bacon, ed. Spedding, 432), a proviso to the Statute of Uses, — “Foreseeing that the execution of uses would make frank-tenement pass by contracts parol, they made an ordinance for enrolments of bargains and sales . . . but without any preamble, as may appear, being but a proviso to this statute.”

⁴² No. II, §§ 1 and 34, 3 and 12, 5 and 35.

⁴³ *Id.*, §§ 6, 10, 11, 18, 19, 22, 30, 31.

⁴⁴ *Id.*, §§ 38-43.

⁴⁵ *Id.*, § 2.

⁴⁷ *Id.*, §§ 32, 35.

⁴⁶ *Id.*, § 15.

⁴⁸ *Id.*, § 13.

the writer asks. He thinks it would be a good thing if uses were "clene put out the lawe."⁴⁹ The document is an able statement of the case against uses; and it may well have been the raw material upon which those who drew the preamble to the statute worked.

The three draft bills concerning uses and wills present two different schemes for dealing with the problem of the use — there is a less thorough-going scheme which was not followed, and there is the more complete scheme which was followed.

The less thorough-going scheme⁵⁰ begins with a short general preamble to the effect that by means of uses "the good old lawes of the realme be nygh subverted"; and then goes on to subject the equitable interest to the liabilities of the legal estate for certain purposes, and to limit the modes in which uses can arise. Thus the estate of the *cestui que use* is made liable to forfeiture on attainder, to curtesy, to his ancestors' specialty debts to which the heirs were bound, and to the incidents of tenure.⁵¹ Recoveries, fines, feoffments, releases, and confirmations by *cestui que use* were to have the same effect as if *cestui que use* had had the legal estate.⁵² For the future no uses were to have any legal effect except those clearly expressed at the time of conveyance; and a recovery was not to be suffered to any other use but to that of the recoveror.⁵³ No bargain, contract, covenant, or agreement with reference to land was to change the use of the land.⁵⁴ Those injured by the breach of such contracts were confined to their remedies for breach of contract.⁵⁴ Then comes a clause, the effect of which would have been somewhat revolutionary, as it would, apparently, have prevented a recovery from affecting the interests of remaindermen and reversioners without their own consent.⁵⁵

This scheme would no doubt have put an end to some of the most crying evils produced by uses. But it would have effected this object by subjecting the use to many of the rules of the common law. It would have made the common-law modes of conveyance necessary if the use was to be transferred, and it would thus have stopped beneficial developments in the law of conveyancing. On the other hand it would not have stopped the practice of devising land, which was so hurtful to the king's pecuniary interests. The limitation

⁴⁹ No. II, § 15.

⁵² No. III, § 4.

⁵⁵ *Id.*, § 7.

⁵⁰ No. III.

⁵³ *Id.*, § 5.

⁵¹ *Id.*, §§ 1-4.

⁵⁴ *Id.*, § 6.

put upon the effect of a recovery, and the retention of the power to devise, lead one to think that this was a scheme put forward by the landowners. They wished to concede as little as possible, and hoped to minimize their concessions by introducing a clause which modified the effects of a common recovery. It was essentially a half and half measure. It was useless, or almost useless, to the king; and probably therefore it never had a chance of passing into law.

The more complete scheme, which is in substance enacted in the Statute of Uses, is contained in two draft bills.⁵⁶ They did not tinker with the problem as the other bill had done, but boldly annexed the legal estate to certain uses in land. Thus they got rid of the various evils attending the separation between the legal and equitable estate in the case of those uses to which they applied. But they did not abolish uses, as some had advocated; and thus they preserved for the land law the elements of elasticity, and the opportunities for development which were inherent in the use. The points wherein these draft bills differed from the statute actually enacted are merely verbal. In fact they show signs of having been corrected so as to embody the small changes made during the passage of the bill through Parliament.⁵⁷

The draft bill concerning the enrolment of covenants, contracts, bargains, or agreements made with reference to the uses of lands⁵⁸ is as elaborate as the two last-mentioned draft bills concerning uses and wills; and it is clearly intended to be supplemental to them.⁵⁹ It proposed to enact that the use of lands should not pass nor be created by reason of "any recoveries, fines, feoffments, gifts, grants, covenants, contracts, bargains, agreements, or otherwise," unless declared by writing under seal and enrolled as provided by the act.⁶⁰

⁵⁶ Letters and Papers, Henry VIII, ff. 252, 261 *et seq.*, calendared Letters and Papers, Henry VIII, X, Nos. 246 (1), and 246 (2); these two documents are in substance identical so far as they go; but the former is much torn in one place, and it stops short some distance before its natural conclusion.

⁵⁷ Because they are substantially similar to the statute we have not thought it worth while to print them.

⁵⁸ Letters and Papers, Henry VIII, vol. 101, f. 303, calendared Letters and Papers, Henry VIII, X, No. 246 (6).

⁵⁹ It assumes that the use will pass by a bargain and sale, which would have been impossible under the first scheme.

⁶⁰ "The use . . . of suche londes shall not pass, alter, chaunge from on to an other nor shalbe had or made by or to any person or persons to any use or trust or confidence by reason of any Recoveries fynes Feoffments gyftes grauntes Covenants contracts

Further, it provided that, for the future, all evidences of any kind should be enrolled.⁶¹ One chief officer or more (to be called the Master of Enrolments) was to be appointed by the king in each shire and riding; and for each of these officers a clerk was to be appointed by the Chancellor, to be called the Clerk of Enrolments. They were to take acknowledgments of and to enrol evidences and writings concerning lands within their districts;⁶² they were to take an oath of office to act honestly, and to see that the parties to these documents were capable of disposing of their property;⁶³ and they were to have a seal wherewith to seal the documents acknowledged before them. The date of the acknowledgment and the number of the roll on which they were to be enrolled were to be endorsed on the deed; and all documents not enrolled within forty days of their date were to be void.⁶⁴ The deeds so enrolled were to be absolutely conclusive upon all parties to them.⁶⁵ The fees of these officials and their qualifications for office were fixed; and penalties were provided for neglect of duty. It is interesting to note that it was the committee of the Council, created by the Act *pro Camera Stellata* of 1495, which was given jurisdiction in such cases.⁶⁶ The clerk and the master must act together in

bargeyns Agrements or otherwyse, Onles that the use trust or confidence . . . be declared by wrytynges suffyciently to be made under seale . . . and that the same wrytyngs be enrolled in manner and forme underwrytten."

⁶¹ "Also it ys ordeynyd . . . that all manner of evydences and wrytynges, of what name soever they be, concernyng londes tenementes or heredytaments, which shall be made after the said laste day of July . . . 1836, shalbe knowleged and enrolled in manner and Forme as shalbe hereafter expressed in thys acte."

⁶² There was a proviso at the end for the enrolment of the conveyances of land which lay in sundry shires in such shire as the party might elect.

⁶³ "That . . . they shall not Receve the knowlege of any persons beinge naturall folos or not of hole mynde, and that they shall endeavour themselves with all due circumsstance to knowlege and serche that the persons knowledgyng any evydences or wrytynges a for them do it of their true and good wytte."

⁶⁴ A relaxation was made in cases where the party making the deed died within the forty days.

⁶⁵ "No person . . . shalbe admitted to denye the same evidences and wrytynges soo knowlegyd and ynrollyd to be his . . . dede, Nor to allege that they were not hole of mynde at the makinge and sealinge of them nor that suche evydences or wrytynges were made by mynasses or duresse of imprisonment"; it was, however, provided in a later part of the act that the lands of *femes covert* should not be conveyed from them, "but after suche ordre and forme as hathe hertofore be accustomed by the course of the lawes of the Realme."

⁶⁶ "In case any of the seid offycers or Clarkes do falsely and untruly exercyse and use the seyde office in any parte that shall apperteine to the same, or take any more or

taking acknowledgments. The clerk must prepare the rolls; and, within thirty days after the end of the year, must deliver them to the master, who within the next thirty days must deposit them in the Chancery. These rolls were to be open to the public, and could be searched and copied on payment of fixed fees. Lands in towns where conveyances were enrolled before the mayor or other officer, were exempt, as were copyholds, and conveyances enrolled in the Chancery or before the Exchequer or the judges of either bench. Landowners were allowed, if they wished, to enrol evidences made before the Act came into force; and similarly persons were to be allowed, if they wished, to register "all oblygacyons, acquyttaunces and other wrytinges consernyng personall thinges. Being enrolled, they were to have the same force and effect as if they had been acknowledged before a court of record.

This is a remarkably comprehensive scheme for the registration of conveyances; and, if it had been passed and efficiently carried out, we should have to-day in working order a series of county registers, which would have considerably simplified the land law. We should not now be struggling to fit a scheme of registration on to a system which the large unregulated powers of landowners and the ingenuity of conveyancers has made more complex than any other modern system. Such a scheme would have been easy to apply to a comparatively youthful legal system, and in a country which was as yet by no means densely populated. The then existing defects in the land law were caused chiefly by the complexity of the procedure in the real actions, and by the need to regulate uses. The first defect was to a large extent remedied by the substitution of the more convenient action of ejectment for the older real actions; and the second would have been remedied to a large extent by the Statute of Uses, if it had been combined with an act providing a comprehensive scheme of this kind for the registration of conveyances. The causes which render a scheme of registration so difficult to-day are largely the result of the failure to pass the bill proposed in 1536.

other fees than is above lymtyed by this Acte, and be thereof convict by witnes proves or confessyon be fore the lord Chauncellor lorde Tresorer lord presydent of the kinges most honorable Counseill lord pryvy seall or any of them syttyng yn the sterre Chamber at Westminster and Calling to them the too chyff justices of eyther bynche for the tyme beinge or one of them, that then every of them, so beinge convicte, shall lose his offyce, and gelde treble damages to the party greved, And over that shall have imprysonment of his bodye tyll he have made fyne att the kynges wyll and pleasure."

Parliament chose the right course when it passed the comprehensive scheme submitted to it for dealing with the problem of the use. It was necessarily a difficult and a complicated act to consider; and perhaps Parliament was hardly prepared to face the labor of considering another act quite as difficult and complicated. Perhaps too the lawyers again united with the landowners to throw it out; for it is clear that universal registration and the publicity necessarily involved were not quite in accordance with either of their interests. Certainly the pecuniary interests of the king were not so directly involved in the passing of these proposals. But the reasons for their abandonment we can only conjecture. We could only learn the truth if the missing records of the proceedings of this Parliament were to come to light. Whatever the truth may be, it is clear that a great opportunity was lost for ever when this bill was rejected. Parliament declined to consider a general scheme of registration, and passed instead a short act, supplemental to the Statute of Uses, to deal simply with those bargains and sales of freehold interests in land which the Statute of Uses had converted into conveyances. The ingenious conveyancer had not much difficulty in evading the obligation to enrol imposed by this makeshift piece of legislation.⁶⁷

This history of the political causes which shaped the Statute of Uses enables us to appraise the preamble to the Statute at its true historical value. Like the preambles to other statutes of this period it is far from being a sober statement of historical fact. Rather it is an official statement of the numerous good reasons which had in-

⁶⁷ That the Statute of Enrolments did not extend to a bargain and sale for a term of years was recognized at least as early as 1595, *Heyward's Case*, 2 Co. Rep. at p. 36a; it was decided in *Lutwich v. Mitton*, Cro. Jac. 604 (1620), that a bargain and sale for a term followed by a release would pass the freehold. The statute did not refer to covenants to stand seised in consideration of love and natural affection, not, as Mr. Jenks (*Short History of English Law*, 121) says, because the legislature was "determined to tolerate them," but because they did not at this date operate as conveyances, see *Wingfield v. Littleton*, Dyer 162 (1558); cf. Y. B. 27 Henry VIII., Mich., pl. 16; it was not till the cases of *Sharington v. Strotton*, Plowden 298 (1565), and *Callard v. Callard*, Cro. Eliz. 344, Popham 47, 2 And. 64 (1597), that the law as to the form and effect of the covenant to stand seised was finally settled. The reference No. III, § 6, to a covenant changing the use is not inconsistent with this view, since at this period, as Ames has pointed out, the term "covenant" is often used simply as a synonym for contract. In fact there is an interesting little history to be told of the evolution of the covenant to stand seised — but it is too long for a note.

duced the government to pass so wise a statute, — the sixteenth-century equivalent of a leading article in a government newspaper upon a government measure. It bears upon it the traces of the alliance between the king and the common-lawyers by means of which the statute had been carried through the House of Commons. It contains all the objections to uses which were the commonplaces of the lawyers, — “the fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses interests and trusts”; the testaments made by dying men under the influence of greedy and covetous persons; the insecure titles of purchasers; the loss of dower and curtesy; the perjuries committed in the legal proceedings arising out of these secret uses. Skilfully insinuated among these objections, and holding by no means a prominent place, are those which the king felt so keenly, — the loss of the incidents of tenure, of the lands of traitors, of land given to aliens, of the escheats, and of the rights to year day and waste of the lands of felons.⁶⁸

Professor Maitland has truly said that the Statute of Uses “was forced upon an extremely unwilling Parliament by an extremely strong-willed king.”⁶⁹ But I think that the evidence shows that this strong-willed king was obliged first to frighten and then to conciliate the common-lawyers in order to get the Statute through the House of Commons; and that probably their opposition caused the failure of his well-considered scheme for the registration of conveyances. If this be so the action of the common-lawyers has had a large effect upon the form which the Statute of Uses and the Statute of Enrolments finally assumed, and, consequently, upon the whole of the future history of the law of real property.⁷⁰

⁶⁸ “The lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur faire filz chivalier* and *pur file marier*. . . . The king’s highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffment to the uses of aliens born, and also the profits of waste for a year and a day of felons attainted, and the lords their escheats thereof”; as a matter of fact lands held to the use of traitors had been declared forfeit by a statute of the preceding year, — 26 Henry VIII, c. 13, § 4.

⁶⁹ Maitland, *Equity*, 35.

⁷⁰ Mr. Jenks thinks (*Short History of English Law*, 100) that “the secret and unavowed purpose” of the Statute of Uses was to secure “the estates of the monasteries for the crown” — that in fact it was introduced in view of the act against the smaller monasteries which was passed in the same session of Parliament as the Statute of Uses, — 27 Henry VIII, c. 28. I cannot agree to this theory. In the first place, the evidence which I have adduced seems to show that the two objects of the Statute were (a) the

NO. I.

LETTERS AND PAPERS. HENRY VIII. Vol. 56, fos. 36-39. Calendared in L. and P., H. VIII. Vol. IV. No. 6043 (6).

[I have divided this document into numbered paragraphs for convenience of reference. In the original there is no such division. I have punctuated both this and the succeeding documents.]

(1) For as moche as long before thys tyme hathe ben and yett to this present day there is grete trobull vexacion and unquietness amonges the kynges suggettes withyn this hys nobyll realme of Inglonde, whiche trobull moste comenly risith amonges the sayde suggettes for tytyll of londes tenementes and other hereditamentes within thys hys realme, as well by intayle as by uses and forgyng of false evidences, whiche all is so secretly done that men can nott com to the trew knowledge therof for lake of good and holsum lawis provided for the same, by whiche the purcheser or biar may have perfett knowledge in what case and condicion the premisses stond, to the grete dishonor of owre soverayn lord the kyng, all his realme, and to the intollerable costes and charges and utterly undoyng of a grete parte of his feyghtfull suggettes within this hys realme.

(2) FOR REMEDI wherof and for augmentation of Justes be hytt In actyd by owre soverayn etc. that, from the fyrst day of Janiver next coming forward for ever, all intayles made of londes tenementes and all other hereditamentes be utterly frustrate disannulled and adnichelate for ever, as well intayles before thys day made as any hereafter to be made so that all manner of possessions be in state of fe simple from this day forward for ever.

(3) FURTHERMORE be ytt inactyd by like auctorite thatt no use nor uses hereafter to be made to any person or persons upon or for eny possessions within thys realme be vayleable or of eny effect in the law, nor that no manner of person schall take or resevye any profett or benefite of the same, onles the same use be recorded in the kynges courte of the comen place, and that the officer or officers therfor deputed schall kepe for everi schere within thys realme a particuler Rool or boke to the intent that the purcheser and all other may com to the knowledge therof by the sayde recordes, and that the officers therfor deputed schall take to the kynges use for suche record ij s. sterling and nomore, and for the regestring and wrytyng thereof for everj viij lines being of x inches long j d. sterling and no more.

(4) AND be hyt further enactyd by like auctorite, to avoyde all untrowthe for forgyng of evidences, that every purcheser schall,¹ immediatly after the partie tha sellyth hathe selyd and fermid the deade of gift of any londes tenementes for [sic] other hereditamentes so sold and possession thereapon taken with sufficient recordes, that then the sayd dede to be openly red apou a holy day next folowyng in the parische cherche or cherchis in whiche parische or parishes the sayd lond schall ly, att suche tyme as moste people is present,

improvement in the king's feudal revenue, and (b) a much needed improvement in the land law; in the second place, the Statute was not needed for the purpose for which Mr. Jenks supposes that it was passed; in acts of attainder it was common to include the lands of which the attainted person had the use and to exclude those of which he was merely feoffee to uses, see Holdsworth, 2 History of English Law, 403, n. 3, and for another illustration see also 21 Henry VIII, c. 25; what the legislature habitually did in acts of attainder it could equally well have done in the act dissolving the smaller monasteries.

¹ The grammar is somewhat faulty.

and so red, the vicar parische preste or curate to fyrm the sayd deede, to the intent that the most parte of the parische may knowe of the sayde sale and possession so made and gevyn; and for further suerte that the sayde deede be regestred in the schere towne In whiche schere the sayd lond schall lye, and the mayre bayliff or other hee officer of suche schere towne to sett to the seale of the towne or suche a seale as therfor schall be ordered and apoynted, and they to take for registryng and sealyng of the same ij s. sterling and no more.

(5) Provided allways that this act nor nothyng theryn conteyned be in any wise preiudiciall to the nobyll men off thys realme, being within the degree of a baron, butt that theyr londes and possessions may remayne Intayled as hitt now is or hathe ben in tymes past, and that no maner of person or persons presume to by any suche noble mens inheritans within the degree aforesayd, except the sayd noble man have fyrst obteyned the kynges licens under hys brode seale therfor; the whiche obtayned, hytt schall be lawfull as well for the sayd nobull man to sell as to any of the kinges naturall borne subiectes to by and purchesse the same ther londes tenementes and other hereditamentes, withoute any preiudice of any of the parties.

(6) AND be hitt further inacted by like auctorite thatt londes tenementes and other possessions so purchased, being the dede openly redde in the parische or parishes where the lond lieth, subscribed by the curate regestrid, and sealid in the schere towne as is afore sayd, schall not be devict evict or recoverid owte of the power and possession of hym that so hathe purchased them In no court or courtes within the kynges realme, butt thatt he thatt is so possessed, as is aforesayd, schall peasably possess and inioy the same to hys heyrys and assines for ever.

(7) AND further be hytt inactyd by auctorite aforesayd thatt all manner of londes tenementes and other possessions of the whiche before thys tyme Recovery hathe ben had or fyne leveyd apon, and v yeris past after the recovery or fyne, be taken for fee symple in the law, to the possession of hyt for ever, any law or costume herto fore made or used to the contrary notwithstanding.

(8) AND be hitt further inactyd by the auctorite aforesayd that every manner of person beyng seasid of londes tenementes and other possessions, of whiche hys anciters or predecessors have ben peasably seased and possessed by the space of xl yeris Immediattly afore, without any clayme made by dew course of the law within the sayd tyme, thatt then from thens forthe no action to be admitted in no corte or corttes withyn thys realme to disposes any person or persons so possessid, butt that the possessor schall injoy the same to hym hys heyris and assines for ever.

NO. II.

LETTERS AND PAPERS. HENRY VIII. Vol. 101, fo. 282. Calendared in L. and P., H. VIII. Vol. X. No. 246 (3).

[I have added the numbers to the paragraphs of this document.]

Here after Folowyth a small parte (in regard) of ye myscheiffes wronges and in Conuenyenssez which ye Kinges Subiectes do suffer by suffraunce of usez within this realme.

(1) Fyrst, y^{er} is no accion ayenst hym or them which have ye use but by statutez, wheirapon do ryse such doutes thatt no man can be sure of any land lawfully purchesyed by lawfull barganyng.

(2) Item, ye openyons of ye Justices do chaunge dely apon the suertyez For landes In use

(3) Item, y^{es} usez causyth ye Justices to be in doute or in seuerall openyons

In ye most Commen casez, as In case a man have dyvers Feffez to his use of landes In dyvers Townez within one shyre, and he do make a deed of Feoffment of all ye seyde landes and make leuery but in one Towne, this grettly doutyd whether all ye lond pass or but thatt land whereof he made leuery.

(4) Item, if a recovery he had ayenst *Cestui a que use* In Tayll, whether this shall bynd after his deth or no is also in doute amonge ye Justices.

(5) Item, if a man ough to have a reall accyon, For yes secrett Feffmentes to usez he can nott Tell ayenst whom to brenge his accyon but ayenst hym thatt Takyth ye profeffettes, and if he breng nott his accyon within a yere he hath no remedy in ye most parte of accyons.

(6) Item, if a man hauyng neuer so much landes In use be bound and his heres In an obligacyon and dye, hauyng nott goodes suffeeynt to satysfye the obligacyon, his heir, tho he haue ye use of a thousand pounce land, shall nott be chargyd with no parte of the sayd obligacyon, and yett if ye land had dissendyd he should haue made Satysfaccion For ye seyde dett.

(7) Item, ye usez cause much landes to come into mortmayn and to Fyndyng of prestes.

(8) Item, usez cause landes to passe by wyll commonly when he that makyth ye wyll knoweth nott whatt he doth nor his gostly Father whatt he wrytyth.

(9) Item, if a man makyth a wyll of his landes and goodes, and hytt is prouyd in ye speretuell Court thatt he had nott att ye makyng of ye wyll such perfett mynd *qualem Testantez debent habere*, all shall be made voyde and yat by ij wytnesez.

(10) Item, he thatt hath Feffez to his use doth apper to be owner and Tenant and is nott, by reson wheiroff many be disseuyd In barganyng with them, and many poore Fermers undun, and many old seruynge men In yer age put From yer offices and anuytez beffore grauntyd them in recompens of yer seruyce doyn in youth.

(11) Item, yes usez doth undo many Wood salez wherfore money is payed.

(12) Item, I omytt ye grett nombre of doutes which doth ryse by usez.

(13) ¹ Item, where, *per Cas*, Some one man takyth asyngler welth their be a hundrioth against one that takyth hurt and losse theirby, is yt a good lawe?

(14) Item, if a man see and consyder the matterz nowe hyngyng in varyaunce in euery the kinges Courtes and in arbitrement, he shall Fynd yt yes decetfull usez is the cause the most parte of the seid varyaunce.

(15) Item, if the usez, which is in Regard but ye shadowe of the thyng and not ye thyng Indeyd, were clene put out of the lawe men y^{at} had right should hereafter rather come to there remedies.

(16) Item, yes usez defraude wemen From dowers and men which mary we [men] Inheritable or Inherytors For y^{er} Interestes as Tenent by the Courtesy.

(17) Item, if a man put a maner enfeffment, to which an aduouson is appendent, be hit neuer so grete in value, he nor his heirez can nat present, and iff he do he is a wrong doer, and so hit is if hit be an aduowson In gros, w^o is grete myscheif and makyth trouble oft.

(18) Item, if a man which hath Feoffes to his use do comande one of his seruantz or Freyndes to Cut downe a Tre in his grounde, or licens a pore man to cut downe a Tre or put his bestes in his grounde, the Feffez mey punyshe the seid servant by Fyne and Imprisonment or utlary or Inditement in the sessyons of peace.

(19) Item, if A. B. haue Feffez to his use, and an estranger put his bestes upon the gronde, A. B. takyth the bestes In his grounde or percas In his Corne and dryuth them to pounce, he that ought the beystes shall punyshe A. B. for takyng the seid bestes.

¹ Here the handwriting changes.

(20) Item, wheirby the lawe of ye Realme if a man do Treson murdre or Felony, in example of other, the Kyng or the other lordes should haue his landes, now *Cestui que use*, commyttyng Treson felony or murdre, shall Forfett no lande by e Commene lawe, to the grete boldness of evyll persons.

(21)² Item, if *Cestui que use* be outlawed, the kyng ough, if he had the possession, to haue ye profettes of his landes, and nowe ye land, beyng In use, he can haue nothyng.

(22) Item, if landes dissend unto ij or mo wemyn w^e mary, if the one husband be of more power then ye other, and Takyth ye hole profettes or ye grett parte, or Fellyth all ye woodes, yer is no remedy by ye commen lawe of ye realme, nor he thatt is wrongyd can nott compell the other to make protecyon nor seuerance.

(23) Item, *Cestui que use* doth occupye the grounde and makyth lessez, if ye lesse do lett downe housez or cut downe woodes, he hath no accyon of wast nor other remedy by ye lawe.

(24) Item, he that hath ye use can nott haue accyon of accompt nor other remedy ayenst his baylyez nor Fermers.

(25) Item, In all accions of Transgressiones accompt or other accyon personall brougth by . . . the Feffez, if any one of them wylbe currupt and relez, all ye matter is lost and all ye other barred For euer.

(26) Item, *Cestui que use* can not make a good quytance to his bayly when he hath payd hym his rent.

(27) Item, women wiche haue ionturez For their lyuez and Feffez to yer usez, mey cut downe woodes and pull downe housez and no remedy by, ye lawe.

(28) Item, yes Feffementes to usez cause many deleys by essoynes vouchers and other wyse In reall accyons, wheirby men be oft Infenytely of their lawfull Righ deleyed.

(29) Item, all yes Feffementes to usez and ententes began Fyrst apon Fraude and disseytt, w^e is nott meytt to be made nor allowed For a lawe.

(30) Item, if aman haue Feffez to his use, and one of his Feffez be unthryfty and be bounde in a statute, ye land shalbe In execucyon For ye porcyon of ye landes of *Cestui que use*.

(31) Item, if the suruyor of ye Feffez dye, his wyff shalbe Indowed of ye iij^{de} parte of other mens landes, and iff ye heir be within age, ye lord etc. shall haue ye ward of ye resedowe of the land etc.

(32) Item, ye usez make double lawe, and cause thatt yer is no remedy att ye comen lawe, For *Cestui que use* can not sue att ye comen lawe.

(33) Item, *Cestui que use* might make no leez graunt Feffment nor relez to be good before ye statute of Richard ye therd, apon which do ryse agrett nombre of doutes and myscheffes.

(34) Item, y^{er} would no accyon lye ayenst *Cestui que use* before ye statutes of perners of profettes apon wiche doth ryse many doutes and unsuertez.

(35) Item, *Cestui que use* can haue no accyon by ye lawe, and yett he semyth Tenant and owner to ye world, which is agrett disseytt.

(36) Item, Fynally the usez began apon disseytt, and ye most thatt folowyth yerof is disseyt, so thatt, ye disseytes thatt be their In, I wyll unther-take shall conteyne a grett boke, if yer be well serched out with study, so thatt ye usez subuerte ye lawe and Customez of yis Realme.

(37) Item, here fowith For whatt purpose and entent Feffementes to usez haue byn practysed within this realme.

(38) Fyrst, to ye Intent and euyll purpose that if a man of power gatt ouer ye possession of landes, albe thatt hytt were by wrong, yett, if he were able to kepe ye possession, he would make so many Feffmentes, thatt the partye that

² Here the original writing begins again.

should shewe, mygth neuer knowe ayenst whome to breng his accyon, and so without remedy by ye Comen lawe of ye realme.

(39) Item, to ye entent To dyffraude ye lord of whom the land is holdyn from ward maryage and releyffe, And to ye entent that ye cheif lord should nott knowe apon whatt person or persons to adouwe, For his rentes Customez and seruyces dewe.

(40) Item, to ye entent that if a man dyd Treson murdre or Felony thatt he should Forfett no land.

(41) Item, to ye entent that all recouerey in accyons reall ayenst hym should be voyde.

(42) Item, to ye entent thatt, if any recovery were had in any accyon personall For dett or otherwyse, thatt yer should be no execucyons of ye landes.

(43) Item, to ye entent thatt no man should knowe of whom to take a leez gyfft or Fefement, For their [*sic*] Fraudez and such lyke were usez deuysed.

Endorsed: — "Damna usuum," and "Inconveniences for sufferance of uses."

NO. III.

LETTERS AND PAPERS. HENRY VIII. Vol. 101, fo. 286. Calendared in L. and P., H. VIII. Vol. X. No. 246 (4).

[I have added the numbers to the paragraphs.]

For as moche as by reason of uses lately practised in this realme, the good old lawes of the same be nygh subuertid, to the derogacion of the Kinges crowne and hurt of his people and Subgettes of this realme, Be it therfor enactid, by auctorite of this present parliament, as hereafter ensueth in these articles folowyng.

(1) First, if eny person or persons, hauyng the use of eny londes tenementes or hereditamentes, be atteyntid or convict by the dewe course of the lawes of this realme of eny treasons murdres or felonyez or eny other offence wherby londes ought to be seased lost or forfit, shall in euery suche case lose and forfit the londes tenementes and hereditamentes, whereof suche person or persons so offendyng shall haue suche use att the day of suche offensez don or eny tyme after, in like maner forme and condicion in euery behalf as if suche offendor, hauyng suche use, had had suche estate in possession reuision or remaynder in the said londes tenementes or hereditamentes so to be seased lost or forfit, as he had in the use.

(2) Item, if eny man mary a woman hauyng the use of eny londes tenementes or hereditamentes in fee simple or intayle, and after suche mariage haue issue by the said woman, and she dieth, the husbond shalbe tenant by the courtesy of the same londes tenementes and hereditamentes, so beyng in use, in like maner forme and condicion as if his wife had had suche estate in the possession of suche londes tenementes or hereditamentes as she had in th' use.

(3) Item, if eny use of londes tenementes or hereditamentes discend in fee simple to eny person or persons from their auncestors, that then, in euery suche case, the heir and heirez, to whom suche use shall discend, shalbe bounden to all accions execucionz, and to all other intentes whatsoeuer, in like maner forme and condicion as suche heir or heires shuld haue ben bounden, if the auncestors had died seased of the possession reuersion or remaynder of suche londes tenementes or hereditamentes so discendid in use.

(4) Item, euery person and persons, hauyng the use in eny londes tenementes or hereditamentes, shalbe admytted taken and reputid, in all condicions¹ and to all ententes and purposez, tenants to the chife lerdes of whom the londes

¹ The word "condicions" is written over the word "accions."

tenementes or hereditamentes, wherof they haue suche use, shalbe holden, in like maner forme and condicion in euery behalf, as if they had had suche estate in the possession reuersion or remaynder of the londes tenementes or hereditamentes, whereof they haue suche use, as they haue in the use, and that all recoueryez had or hereafter to be had ageyn them, and fynes feoffementes releassez and confirmacions levied made or to be levied and made by them, shalbe of the same effect strength and force ageyn them and their heirez, to all intentes and purposez, as if they, att the tyme of suche recoueryez or levyinge suche fynez or makinge suche feoffementes releassez or confirmacions, had had suche estates rightes and interestes in the possession reuersion or remaynder of the same londes tenementes or hereditamentes so beyng in use, as they had in the use.

(5) Item, that uses may be declared and expressed in Fynes, if the parties to the fyne will require it, and that euery fyne feoffement releasse and confirmation, to be made levied or had by eny person or persons to eny person or persons after the first day of January next, wherein none use shalbe certainly lymytted and fully expressed, shalbe takyn to the onely use of these persons to whom suche fynes feoffementes releassez or confirmacions shalbe made or had, and that all recoueryez shalbe to the use of the recouersers, eny usage to the contrary heretofore had not withstondyng.

(6) Item, that no bargeyn contract Couenaunt or Aggrement, by them selves onely, shall make or chaunge the use of eny londes tenementes or hereditamentes from eny person or persons, but that the persons grevid by non performance of suche bargeyns contractes couenauntes or aggrementes, their executores or admynistrators, shall haue their remediez by accions of couenaunt or upon the case or otherwise, as the case shall require to be requisite, and recouer their damages and amendes in euery suche accions and sutes for brekyng and non obseruyng suche bargeynes contracts couenauntes and aggrementes, and none otherwise, eny usage heretofore used to the contrary herof not withstondyng.

(7) Item, that recoueries, in comen writtes of entre in the post, had by assent of the parties, and fynes and feoffementes hereafter to be had or made, shall bynde the parties to suche recoueries fynes and feoffementes and their heires and the feoffez to their usez and their heires; And that none other person or persons, whiche shall haue eny reuersion or remaynder of the londes and tenementes hereafter to be recouered in suche writtes, or wherof eny fynes or feoffementes hereafter shalbe made or had, shalbe bounden or take eny losse damage or hurt by reason of suche recoueries fynes or feoffementes, unlesse they be made privy to them by voucher, aide prayer, or otherwise by their assentes determyn or release their interestes rightes and titles in suche reuersions and remaynders, but that the title interest and possession whiche eny person or persons, not beyng parties nor privie to eny suche recoueryez fynes or feoffementes shall haue in eny reuersions or remaynderz att the tyme of such recoueryez fynes or feoffementes had or made, shall still remayn and abide in them and their heires, as if no suche recoueryez fynes or feoffementes had be [*sic*] had or made.

W. S. Holdsworth.

ST. JOHN'S COLLEGE, OXFORD.

THE PROPOSED PATENT LAW REVISION.

ON the eve of the adjournment of Congress, on August 8, 1912, the Committee on Patents reported back to the House of Representatives the Oldfield Revision and Codification of the Patent Statutes¹ with an amendment in the nature of a substitute, and recommended that this substitute be passed. The committee's purpose, expressed by its chairman, who is also the author of the bill, was to "give everybody an opportunity to study the question, and give the people of the country the opportunity to see what is provided for in the bill, and ascertain what is the sentiment of the country upon the proposal";² and then to press the bill for passage in the session beginning in December, 1912.

During the spring of 1912, hearings were held for several weeks by the Committees on Judiciary and on Patents of the House of Representatives upon various proposals to amend the patent laws. The opportunity for persons other than the sponsors of the proposed legislation to learn of these hearings and to attend them was necessarily limited; and even among those who attended, their importance was probably not fully realized. For no one could then have anticipated that practically all of the changes advanced in these proposals would be combined in the substitute bill to be reported. Nevertheless, witnesses testified, written communications were received, and suggestions came "from practically every part of the country."³ "We had before us," said the chairman of the Committee on Patents, "manufacturers of patented articles from almost every state in the Union, and we had prominent inventors and prominent patent attorneys before us."⁴ But out of the sixty persons whose testimony and communications were reported in these hearings, less than half a dozen favored the proposals which have been embodied in the bill recommended.⁵

¹ H. R. 23,417.

² Congressional Record, Aug. 8, 1912, p. 11,333.

³ Report of the Committee on Patents, 62d Cong., 2d Sess., House of Representatives, No. 1161, Aug. 8, 1912 (hereinafter called "Report"), p. 1.

⁴ Congressional Record, Aug. 8, 1912, p. 11,333.

⁵ Among those who expressed their opposition were inventors, such as H. Ward

In all essentials, the provisions which evoked the emphatic opposition of the overwhelming majority of manufacturers, inventors, and representatives of commercial and scientific associations appearing before the Committee on Patents in opposition to the original bill reappear in the substitute. In addition, the substitute contains a number of provisions extending the application of the Sherman Anti-Trust Act, wherever patents are involved, to specific transactions which are not now covered by that act and which, if no patents were involved, would under the existing law, or even under the other provisions of the substitute bill, lie outside the prohibition of the Sherman Anti-Trust Act. These were not contemplated in the original Oldfield bill, were neither discussed nor suggested by anyone upon the hearings, and were not foreshadowed by any patent legislation previously introduced in either branch of Congress. In scheme, they somewhat resemble the proposed amendments to the Sherman Anti-Trust Act introduced earlier in the session by Senator La Follette and Representative Lenroot;⁶ except that their bills avowedly applied to all articles of commerce, patented as well as unpatented, while the substitute Oldfield bill, by limiting its application exclusively to patented articles, discriminates grossly in favor of unpatented articles.

The three main proposals of the bill are briefly these:

Compulsory licenses are authorized by providing ⁷ that if any applicant shall establish in a federal district court that a patent owner who has purchased a patented invention from the original inventor is withholding it "with the result of preventing any other

Leonard, Dr. L. H. Baekeland, Benjamin M. Des Jardins, F. L. O. Wadsworth, Cortlandt F. Carrier, Jr., Spencer Miller, and Thomas A. Edison; eminent patent lawyers and publicists, such as Frederick P. Fish, Livingston Gifford, Louis D. Brandeis, E. J. Prindle, Samuel Owen Edmonds, Horace Pettit, Frank L. Dyer, Walter F. Rogers, and William W. Dodge; manufacturers representing concerns such as Thomas A. Edison, Inc., U. S. Mail Chute System, Bissell Carpet Sweeper Co., Gillette Safety Razor Co., Columbia Phonograph Co., Brown & Sharpe Co., C. B. Cottrell & Sons Co., R. H. Ingersoll & Bro., and the Lidgerwood Mfg. Co.; representatives of scientific societies and associations, such as the Inventors' Guild, the American Institute of Chemical Engineers, the Association of Registered Patent Attorneys, the Merchants' Association of New York City, the National Association of Stationers and Manufacturers, the Pennsylvania Retail Jewellers' Association, the Chambers of Commerce of Rochester, and of Cleveland, and the Patent Law Association of Washington, D. C.

⁶ S. 4931, H. R. 15,926.

⁷ Section 1.

person from using the patented process" more than three years after the patent is issued, the court shall order the patent owner to grant to the applicant a license to use the invention upon such terms or royalty as the court deems just.

The non-enforcement of license restrictions is secured by providing⁸ that the patent owner shall no longer be permitted to bring an action for infringement of the patent, when the purchaser, lessee, or licensee of the patented article has committed a breach of the contract of sale, lease, or license by the conditions of which he obtained the patented article.

The extension of the Sherman Anti-Trust Act is effected by providing⁹ that any patent, used as part of any combination in restraint of trade or commerce among the several states or with foreign nations, or to monopolize or in any attempt to monopolize such trade, or used in any manner prohibited by this act, may be condemned in the manner provided by law for the forfeiture, seizure, and condemnation of property illegally imported; and also by providing¹⁰ that a violation of the Sherman Anti-Trust Act shall be conclusively presumed from any one of a long list of the most common business transactions, regardless of any surrounding circumstances.¹¹

⁸ Section 2.

⁹ Section 4.

¹⁰ Section 5.

¹¹ Thus, a violation of the Sherman Anti-Trust Act shall be conclusively presumed: (a) When the vendor of any patented article attempts to restrict the price at which such article may be resold; (b) When the vendor of any patented article attempts to restrain a customer from buying or using an article obtained from somebody else, whether such attempt be made by agreement against such purchase, or by a condition of sale of the patented article sold, or by making in the price of the patented article any discrimination based upon whether the customer buys the article from somebody else; (c) When the vendor of any patented article, with a view to preventing competition with such article, acquires any other patent or license; (d) When the vendor of any patented article, with a view to restraining competition, makes in the price of the patented article any discrimination (other than the ordinary wholesale discount) based upon whether the customer buys from him goods of a particular quantity or aggregate price; (e) When the vendor of any patented article attempts to restrain competition, either by refusing to supply somebody, or by consenting to supply somebody only upon terms or conditions less favorable than are accorded to anybody else; (f) When the vendor of any patented article attempts to restrain competition by supplying to somebody, in any particular territory, patented articles upon terms or conditions more favorable than are accorded to other customers; (g) When the vendor of any patented article attempts to restrain competition by making any arrangement under which he shall not sell such patented article to certain classes of persons, or to those doing business in certain territory; (h) When the person dealing in any patented

The provocation for these radical innovations and sweeping changes, according to the report accompanying the bill,¹² was:

"First. The evils arising from the vendor of a patented article fixing the price at which the article must be resold to the public.

"Second. The evils arising from the vendors of patented articles prohibiting their use except in connection with other unpatented articles purchased from them.

article does business under any name other than his own, or that of his firm or corporation; (2) When the vendor of any patented article attempts to prevent competition by supplying such article at a price at or below the cost of production and distribution.

The bill makes these further provisions: Whenever a combination in violation of the Sherman Anti-Trust Act is shown to control any patented article "reasonably required" in manufacture, production, general consumption, or use, and "no adequate opportunity exists to immediately substitute another article thereof of equal utility," the court shall compel the patent owner to continue to supply the patented article "until some other adequate substitute can be provided," upon payment of either "a reasonable compensation to be fixed by the court," or the amount of compensation payable according to any valid contract then existing (section 6). Final judgment, in a civil proceeding, that a defendant has violated the Sherman Anti-Trust Act by the use of any patent in any manner hereinbefore prohibited shall constitute, as against such defendant, conclusive evidence of the same facts and as to the same issues of law in favor of any other party in any other proceeding involving the Sherman Anti-Trust Act (section 7). Whenever a defendant has been adjudged in a civil proceeding to have violated the Sherman Anti-Trust Act by the use of any patent in any manner hereinbefore prohibited, anybody claiming to have been injured by such conduct may, within three years thereafter, intervene, and shall be admitted as a party to the suit, and shall have judgment for the damages resulting from such injury in just the same manner and extent as if he had begun an independent suit to recover such damages (section 9). When a combination has used any patent in any manner hereinbefore prohibited and has been adjudged to have violated the Sherman Anti-Trust Act, the court may partition its property in severalty among groups of stockholders or sell it in parcels as a whole and forbid former stockholders to buy at such sale (section 9). Whenever it appears in a civil suit by the federal government under the Sherman Anti-Trust Act that a patent has been used in any manner hereinbefore prohibited, any person or state threatened with injury may at any time intervene as a party (section 10). Whenever it is alleged in an action by the federal government under the Sherman Anti-Trust Act that a patent has been used in any manner hereinbefore prohibited, no department or official of the United States shall contract to buy anything from the defendant or its subsidiaries until such allegation "be found on final decree to be unfounded," unless no substitute of equal utility at a reasonable price can be found (section 11). In any suit arising out of the infringement of any patent or the breach of any contract whatsoever, it shall be a complete defense that "the plaintiff or the real party in interest at the time of the making of such contract, or of its alleged breach, or at the time of the alleged infringement, at the time of the beginning of said suit was engaged in carrying on business in any manner or to any extent in violation of the provisions of this act" (section 12).

¹² Report, p. 2.

"Third. The evils arising from owners of patents suppressing the same or prohibiting their use in order to prevent competition with other patented or unpatented articles sold by such owners of patents.

"As a remedy for these evils, it was proposed to limit the absolute right now vested in the owners of patents, under which they determine to what extent and in what manner the use of the patent or patented article shall be permitted. With this in view, it was proposed to take away specifically the right recognized by the lower federal courts to fix under the patent law prices at which articles shall be sold at retail, and also to take away the right recently confirmed in the Mimeograph Case to prohibit patented machines from being used otherwise than in connection with unpatented materials furnished by the vendor or licensor."¹³

Whether these "evils" are actual, and whether the proposed changes in the patent law will bring any remedy or advantage, were the questions to which discussion was exclusively directed in the hearings upon the original Oldfield bill, in which the overwhelming number of witnesses opposed the conclusions of the committee.

Before turning to this testimony, the fundamental rights of a patent owner under the laws of the United States may be briefly stated.

Congress has the power under Article I, section 8 of the Constitution to "promote the progress of science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."

Pursuant to this power Congress has provided in section 4884 of the Revised Statutes that a patent owner shall have the "exclusive right to make, use and vend the invention or discovery." As the phraseology of the statute indicates, this exclusive right consists of three components, *i. e.*, the exclusive right to make, the exclusive right to use, and the exclusive right to vend the patented article. The owner of these three exclusive rights may dispose of them singly, or together, or fractionally. If he wishes to manufacture the patented article himself, he may keep the exclusive right to make, and dispose simply of the exclusive rights to use and to vend. If he wishes to manufacture the patented article, and put

¹³ Report, p. 2.

it out only upon some basis which will continue the title in himself, he may keep the exclusive rights to make and to vend, and dispose simply of the right to use. This right of use he may dispose of entirely or partially, according as he wishes. Thus, he may keep the exclusive rights to make and to vend, and most of the exclusive right to use, and grant only a limited right of use; for instance, the right to use the patented article only with such supplies and accessory appliances, and only under such conditions in respect to sale, lease, license and use, as the patent owner shall prescribe.¹⁴

The patent owner, like the owner of any other property, "cannot be compelled to part with his own, excepting on inducements to his liking."¹⁵ Owners of unimproved land cannot be compelled to improve their property, nor — except by eminent domain — to allow others to improve it. Similarly, the patent owner cannot be compelled to use his invention, nor — except by eminent domain — to allow others to use it. Landowners frequently prefer to continue to be owners, and to keep the rights of ownership, and to allow to others only the partial use of their land, subject to conditions of lease. Even when disposing of most of their rights of ownership, landowners frequently convey a limited title, subject to restrictions regarding the character of the improvements that shall be erected or the use to which the property shall be put. The patent owner's rights are neither greater nor more unusual than these familiar rights of landowners. When, therefore, the patent owner requires that his property be used only under certain specified conditions and for certain specified purposes, and with certain specified accessories, he asserts no novel property rights. Indeed, the patent owner's rights are much curtailed, as contrasted with the rights of other property owners, in that the owners of every other form of property may exercise their rights for so long a period

¹⁴ *Bloomer v. McQuewan*, 14 How. (U. S.) 539, 549 (1852); *Mitchell v. Hawley*, 16 Wall. (U. S.) 544, 547-548 (1872); *Adams v. Burke*, 17 Wall. (U. S.) 453, 456 (1873); *Bement v. National Harrow Co.*, 186 U. S. 70, 88-93 (1902); *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912); *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288 (C. C. A., Sixth Circ., 1896); *John D. Park & Sons v. Hartman*, 153 Fed. 24, 27 (C. C. A., Sixth Circ., 1907). See also cases collected in *Henry v. A. B. Dick Co.*, *supra*.

¹⁵ *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 426 (C. C. A., Seventh Circ., 1903).

as they and their successors may desire, while the patent owner may exercise none of his rights beyond the duration of his patent, and at the expiration of the statutory period of seventeen years must relinquish to the public all of his rights.¹⁶

These rights have always been fundamental in American patent law. The right "to fix under the patent law prices at which articles shall be sold at retail," which the committee describes as "recognized by the lower federal courts,"¹⁷ has been settled by the decisions of the Circuit Courts of Appeals of the Third, Seventh, and Eighth Circuits;¹⁸ and by decisions of Circuit Courts of the First, Second, Third, Sixth, and Eighth Circuits;¹⁹ and has been expressly affirmed by the Supreme Court.²⁰ It rests upon principles established by an unbroken line of judicial decisions in the United States.²¹ The same right and the same principles, it may be added, have been established in a line of English decisions culminating in a unanimous decision of the Lords of the Judicial Committee of the Privy Council, which determines the law for the entire British Empire.²² The *Mimeograph Case*,²³ which the House Committee

¹⁶ See *The Supreme Court on Patents*, by Gilbert H. Montague, 21 Yale L. J. 583 (1912).

¹⁷ Report, p. 2.

¹⁸ *New Jersey Patent Co. v. Schaefer*, 178 Fed. 276 (C. C. A., Third Circ., 1909); *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424 (C. C. A., Seventh Circ., 1903); *The Fair v. Dover Mfg. Co.*, 166 Fed. 117 (C. C. A., Seventh Circ., 1908); *National Phonograph Co. v. Schlegel*, 128 Fed. 733 (C. C. A., Eighth Circ., 1904).

¹⁹ *Edison Phonograph Co. v. Kaufmann*, 105 Fed. 960 (C. C., W. D. Penn., 1901); *Edison Phonograph Co. v. Pike*, 116 Fed. 863 (C. C., D. Mass., 1902); *New Jersey Patent Co. v. Schaefer*, 144 Fed. 437 (C. C., E. D. Penn., 1906); *Ingersoll v. Snellenberg*, 147 Fed. 522 (C. C., E. D. Penn., 1906); *New Jersey Patent Co. v. Schaefer*, 159 Fed. 171 (C. C., E. D. Penn., 1908); *New Jersey Patent Co. v. Martin*, 172 Fed. 760 (C. C., N. D. Ia., 1909); *Thomas A. Edison, Inc., v. Ira M. Smith Mercantile Co.*, 188 Fed. 925 (C. C., W. D. Mich., 1911); *Automatic Pencil Sharpener Co. v. Goldsmith Bros.*, 190 Fed. 205 (C. C., S. D. N. Y., 1911); *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. 579 (C. C., E. D. Mich., 1911); *Waltham Watch Co. v. Keene*, 191 Fed. 855 (C. C., S. D. N. Y., 1911).

²⁰ *Bement v. National Harrow Co.*, 186 U. S. 70, 93 (1902); *Henry v. A. B. Dick Co.*, 224 U. S. 1, 30-31 (1912).

²¹ See authorities collected in *The Sherman Anti-Trust Act and the Patent Law*, by Gilbert H. Montague, 21 Yale L. J., 433 (1912), and *The Supreme Court on Patents*, by Gilbert H. Montague, *supra*.

²² *National Phonograph Co. of Australia, Ltd., v. Menck*, [1911] A. C. 336, cited in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 42 (1912); other English cases are collected in *Henry v. A. B. Dick Co.*, 224 U. S. 1, 39-43 (1912), and in *The Sherman Anti-Trust Act and the Patent Law*, by Gilbert H. Montague, *supra*.

²³ *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912).

on Patents states²⁴ recently confirmed the right of the patent owner to prohibit patented machines from being used otherwise than in connection with unpatented materials furnished by himself, was strictly in line with all these authorities. Far from being a recent development, the rule in that case was simply an application of the principles established by the unbroken trend of judicial decisions above mentioned. How unchallenged these principles have been, until the surprising dissenting opinion in the Mimeograph Case, appears from the decisions of the Supreme Court in *United States v. Bell Telephone Co.*²⁵ and *Bement v. National Harrow Co.*²⁶ and the Paper Bag Patent Case,²⁷ in which, it is interesting to note, the author of this dissenting opinion participated and concurred. Notwithstanding the forebodings expressed in this dissenting opinion, a careful reading of the decision itself shows that the Mimeograph Case spells trouble only for those people who, with knowledge of the conditions on which alone the patent owner consents to part with his patented article, expressly agree to these conditions in order to obtain the article, and thereupon deliberately set about to violate their agreement respecting these conditions in order to benefit at the expense of the patent owner; or those people who, fully knowing that a user of a patented article has expressly agreed to the conditions on which alone the patent owner consented to part with it, thereupon deliberately instigate such user to break his agreement respecting these conditions, in order to benefit at the expense of the patent owner. As Justice Wills remarked, speaking to this very point in one of the English cases above referred to: "It seems to be common sense, and not to depend upon any patent law, or any other particular law."²⁸

The substitute Oldfield bill proposes to deprive the patent owner of the right to sue such pirating dealers and manufacturers as contributory infringers, and to relegate the patent owner to separate actions for breach of contract against the army of small users whom these pirates instigate to break their agree-

²⁴ Report, p. 2.

²⁵ 167 U. S. 224 (1897).

²⁶ 186 U. S. 70 (1902).

²⁷ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405 (1908).

²⁸ *Incandescent Gas Light Co., Ltd., v. Cantello*, 12 Pat. Cas. 262 (1895), approved and followed in *National Phonograph Co. of Australia, Ltd., v. Menck*, [1911] A. C. 336.

ments. This proposal leaves the patent owner virtually without remedy. Even if a thousand such suits were successfully prosecuted, the damages would be small in each, and uncollectable in most, and less than the expense of litigation in all. Meanwhile, the patent owner would practically be helpless before the instigator of this piracy.

The evils which the House Committee on Patents declare to be their provocation for sweeping away all these patent rights were not established by the testimony taken before the committee.

By numerous witnesses, who cited scores of examples, it was shown that the difficulties of merchandizing are enormously increased in the instance of novelties. All patented articles are novelties at first, and most of them continue to be novelties to most of the public until the seventeen-year patent period expires. Considering the natural handicap thus imposed on the selling of patented articles, and the further fact that the patent owner must reap his reward before the expiration of the seventeen-year patent period, no aid which the existing law lends to the merchandizing of patented articles can well be called unfair. In his evidence, Mr. Louis D. Brandeis says:

"The fixing of a price has possibly prevented one retail dealer from selling the article a little lower than the other, but the fixing of that price has tended not to suppress but to develop competition, because it has made it possible in the distribution of those goods to go to an expense and to open up another sphere of merchandizing which would have been absolutely impossible without a fixed price. The whole world can be drawn into the field. Every dealer, every small stationer, every small druggist, every small hardware man, can be made a purveyor of that article by comprehensive advertising. You have stimulated, through the fixed price, the little man as against the department store, and as against the large unit which may otherwise monopolize that trade. . . . As you develop the article, you are inciting invention; and what is more important than the invention, you are inciting the commercial development of the competing article."²⁹

²⁹ Hearing before the Committee on Patents, House of Representatives, on H. R. 23,417 (hereinafter called "Hearing"), No. XVIII., p. 4. To the same effect see also the testimony of Fletcher B. Gibbs, representing the National Catalogue Committee

By the same token, license restrictions agreed to by owners when they obtain patented articles solely upon condition that they use them only with supplies that are specially prepared for them, or in continuity with machines that are especially adapted to them, or in some particular manner requisite in order to accomplish the purposes for which they are intended, were declared by numerous witnesses to be both necessary and proper. Mr. H. Ward Leonard, a well-known inventor and an officer of the Inventors' Guild, made this explanation:

"It may be that the article is of such nature that in order that it shall work properly, it shall require very great care in selecting certain conditions of use, certain materials to be used in connection with it. It certainly is a fact that in some instances a man's market for a good article would be completely destroyed if he could not insure himself in seeing that it was properly used after it left his hands."³⁰

The notion that such license restrictions might give patent owners the "practical monopoly of the market" for unpatentable products used with a patented device is disposed of by the fact that such a practical monopoly, far from offending the public policy, actually promotes the general welfare; because the patent owners can attain it only by cheapening the cost of manufacture of the patented article, and can continue it only so long as their in-

of the National Association of Stationers and Manufacturers, and of Frank L. Dyer, President of Thomas A. Edison, Inc., and of Horace Pettit, Hearing, No. II.; of R. E. Shanahan, General Manager of Bissell Carpet Sweeper Co., Hearing, No. V.; of Thomas W. Pelham, Sales-manager of Gillette Safety Razor Co., Hearing, No. VII.; of M. Dorian, Treasurer of Columbia Phonograph Co., and of G. A. LeRoy, representing the Western Clock Co., Hearing, No. VIII.; of J. George Frederick, Vice-president of the Business Bourse, Hearing, No. IX.; of J. A. Jochum, Sales-manager of Gem Cutlery Co., Hearing, No. XI.; of Daniel Kops, Hearing, No. XIII.; of Charles T. Johnson, President of Dover Mfg. Co., Hearing, No. XVII.; of Pierrepont B. Noyes, President of Oneida Community, Hearing, No. XIX.; of J. P. Archibald and John M. Roberts, representing the Pennsylvania Retail Jewellers' Association, Hearing, No. XX.; of William H. Ingersoll (manufacturer of "Ingersoll watches"), Hearing, No. XXII.; of Thomas A. Edison, Hearing, No. XXIII.; and of George Eastman (Eastman Kodak Co.), Hearing, No. XXIV.

³⁰ Hearing, No. III., p. 24. To the same effect see also the testimony of Frank L. Dyer, Hearing, No. II.; Dr. L. H. Baekeland, Hearing, No. IV.; Edwin J. Prindle, Hearing, No. X.; Samuel Owen Edmonds, Hearing, No. XII., and Frederick P. Fish, Hearing, No. XXVI.

vention is not superseded by subsequent inventions still further cheapening the cost of manufacture.³¹ As the Supreme Court explained in the Mimeograph Case:³²

"The market for the sale of such articles (*i. e.*, unpatented supplies) to the users of his machine (*i. e.*, the patent owner's patented machine), which, by such a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction he took nothing from others and in no wise restricted their legitimate market. . . . The public is always free to take or refuse the patented article on the terms imposed. If they be too onerous or not in keeping with the benefits, the patented invention will not find a market. The public, by permitting the invention to go unused, loses nothing which it had before, and when the patent expires will be free to use the invention without compensation or restriction."³³

Thus are the first and second classes of evils relied upon by the committee proved unreal upon analysis. The third class of evils, by which the committee seeks to justify the substitute Old-field bill, are "evils arising from owners of patents suppressing the same or prohibiting their use in order to prevent competition with other patented or unpatented articles sold by such owners of patents."³⁴

"That patents in the United States are bought up in large numbers for the purpose of suppressing competition," continues the committee, "cannot be doubted."³⁵ Significantly enough, the committee cites no testimony that supports this statement. Indeed, as an eminent patent lawyer told the committee upon the close of the hearings: "There is not a particle of evidence before the committee, there is not anything in print anywhere that I have seen, which indicates that that is a matter of the slightest conse-

³¹ *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, 295 (C. C. A., Sixth Circ., 1896; Judges Taft, Lurton, and Hammond; Judge Lurton writing the opinion).

³² *Henry v. A. B. Dick Co.*, 224 U. S. 1, 32, 34, 35 (1912).

³³ To the same effect see the cases collected in *Henry v. A. B. Dick Co.*, 224 U. S. 1 (1912); and also by the present writer in *The Sherman Anti-Trust Act and the Patent Law*, and *The Supreme Court on Patents*, *supra*.

³⁴ Report, p. 2.

³⁵ Report, p. 4.

quence.”³⁶ Instead, the committee goes outside of the testimony for proof of suppression and declares: “It has been the subject of comment and complaint in the public press for years. Moreover, many instances can be found in the reports of the decisions of the federal courts.”³⁷ Quoting from *Columbia Wire Co. v. Freeman Wire Co.*,³⁸ the committee says regarding one of the parties litigant: “It has become possessed of many, if not all, of the valuable patents for the manufacture of barbed wire and machines for so doing.” But the remainder of the sentence and the context flatly disprove every suggestion of suppression, either of patents or of competition. What the court says is:

“It has become possessed of many, if not all, of the valuable patents for the manufacture of barbed wire, and the machines for so doing, and has granted a large number of licenses to persons and corporations under its said patents. The evidence further shows that it has not bound its licensees to any prices, or in any manner limited or restricted their sales or output. . . . In other words, there appears to be, so far as the complainant’s licensees are concerned, unrestricted competition in the sale of their products.”

Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.,³⁹ and *National Harrow Co. v. Bement*,⁴⁰ which the committee cite, it may be noted were both reversed upon the law on appeal.⁴¹ The so-called *Lock Case*,⁴² contrary to the impression conveyed by the committee, did not involve the purchase of patents for purposes of extinction, but raised the question whether an agreement to restrain trade in respect of both patented and unpatented locks was contrary to the Sherman Anti-Trust Act, and the court, of course, held that it was. Far from indorsing the objects of the substitute Oldfield bill, the court in this case emphatically dissents from the committee’s position, saying:⁴³

“The right of a patentee to suppress his own rests upon ordinary considerations of property right. The public has no right to compel

³⁶ Frederick P. Fish, Hearing, No. XXVI., p. 12.

³⁷ Report, p. 4.

³⁸ 71 Fed. 302, 306 (1895).

³⁹ 148 Fed. 21 (1906).

⁴⁰ 21 N. Y. App. Div. 290 (1897).

⁴¹ *Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.*, 154 Fed. 365 (C. C. A., Seventh Circ., 1907); *Bement v. National Harrow Co.*, 186 U. S. 70 (1902).

⁴² *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (1909).

⁴³ P. 559.

the use of patented devices or of unpatented devices, when that is inconsistent with fundamental rules of property."

"The Paper Bag Patent Case,"⁴⁴ from which the committee quotes the opinion of a dissenting circuit judge,⁴⁵ who differed from the majority of his colleagues and from the decision of the Supreme Court of the United States, is described by the committee as the best known instance in the reports of suppression of a patent to prevent competition.⁴⁶ This admission is important, because this case, as the Supreme Court pointed out in its decision,⁴⁷ is a clear instance, not of the wilful suppression of a patent, but simply of the rejection of one invention and the use of a better invention accomplishing the same purpose more satisfactorily.⁴⁸

The conclusion of the committee, therefore, that these citations are sufficient to show that the practice of buying up and suppressing patents is widely indulged in⁴⁹ does not seem warranted.⁵⁰ Equally

⁴⁴ *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 150 Fed. 741 (1906), 210 U. S. 405 (1908).

⁴⁵ Report, pp. 5-6.

⁴⁶ Report, p. 5.

⁴⁷ Pp. 427-429.

⁴⁸ One of the witnesses before the committee, referring particularly to this case, explained this point: "Let us take the extreme case," said he, "of which I do not think there are many instances. A man has two patents, each of which is complete in itself and each of which is operative. He knows, because he studies the art, that one is better than the other. That is substantially the Paper Bag Case, where the plaintiff was making first-class machines under one patent, and held another patent which he was not using, and which, we will assume, was radically independent of the one under which he worked. His machines were making exactly the same paper bags which could have been made by machines built under the other patent. He spent, very likely, hundreds of thousands of dollars in the development of the machine he was using. He gives the public the article that they want made on machines built under the patent which he uses. I say that under those circumstances there is absolutely no reason, based upon public policy, why that man should not hold this second patent, which he is not using for the sake of protecting him in the use of his first idea. That would give him the monopoly of the manufacture of one particular kind of paper bags only, and perhaps not of that. There are many kinds of paper bags in competition with each other; the patentees and manufacturers of to-day are trying to find the best machines for making them. It may be that he invented the second patent in his own factory. If he purchased it, his object very likely was that he might have this other way of making these same bags, so that if this other way turned out to be a better way he might use it. If, in the course of time, this second invention appears to be the better way, he will use it." (Frederick P. Fish, Hearing, No. XXVI., pp. 9, 10.)

⁴⁹ Report, p. 5.

⁵⁰ Before taking leave of this point, it may not be amiss to quote the testimony of two witnesses, the first a leader of the patent bar who has appeared in most of the patent cases before the Supreme Court in recent years, and the second the greatest

untenable appears the contention that the aggregation of patents under single ownership is an oppressive monopoly, which should be forbidden. This contention was disposed of by the Court of Appeals of the Seventh Circuit, in reversing one of the identical cases cited by the committee.⁵¹

"Their contention comes to this: If he owned either alone, over that he would have complete dominion; owning both, he controls nothing. The public has no right in either invention, therefore the public has the right to have them both in the market competing for buyers. Naught plus naught; the sum of the two naughts is a substantive quantity."

The value of the comment and complaint in the public press which the committee mentions as proving the suppression of invention does not merit serious discussion. Not a single instance of such comment and complaint is specified in the committee's report. "I wanted," declared the chairman when he presented the report to the House,⁵² "to get up as good a report as we could, to make it as plain as possible." Since this is the best showing the committee can make in respect to suppression of inventions, it is not presumptuous to affirm that present conditions require no change in the patent law upon this point.

inventor of the age; "I personally cannot think of an instance in my career of a meritorious patent being suppressed," says Frederick P. Fish, "I have known of the charge, but have in every case known that it was unfounded." (Hearing, No. XXVI., p. 13.) "I have heard and read numerous statements that many corporations buy valuable inventions," says Thomas A. Edison, "but no one cites specific cases. I myself do not know of a single case. There may be cases where a firm or corporation has bought up an invention, introduced it, and afterwards bought up an improvement and ceased using the first patent — suppressed it, in fact. Why should that not be done? It is for the benefit of the public that it should get the latest improvement. I cannot see why the public should be asked to change the patent law to enable a competitor to get hold of the disused patent so he could have a basis on which to enter into competition with the pioneer of the invention who has introduced an improved machine. Before any changes in the law are made, let the objectors cite instances where injustice has been worked to the public by the alleged suppression of patents for other reasons than those which were due to improvements." (Hearing, XXIII., p. 34.) The distinction thus drawn by Mr. Edison between the wilful suppression of inventions, and the rejection of inventions after careful experimentation and trial, in favor of the use of better and more useful inventions which accomplish the same purpose more satisfactorily, must be firmly kept in mind in order to judge the situation fairly.

⁵¹ *Indiana Mfg. Co. v. J. I. Case Threshing Machine Co.*, 154 Fed. 365, 371 (1906).

⁵² *Congressional Record*, Aug. 8, 1912, p. 11,333.

Much solicitude is evinced by the committee lest the existing patent laws enable owners of patents to withdraw a large amount of personal property from the control of the state courts and state legislatures.⁵³ "Nothing is more fundamental in our government," declares the committee, "than the clearly marked line between the jurisdiction of the state and of the federal courts."⁵⁴ Nevertheless, the committee recommends a scheme of compulsory license which gives every federal district court throughout the United States power to hale before it every patent owner (excepting original inventors) whose invention for any reason whatsoever has not come into use within three years after the issuance of the patent; and thereupon judicially to determine its value, and compel the patent owner to grant to any competitor who asks it a license to use the patent upon such terms as the court may fix. This would transform the seventy-two federal district courts into "courts of patent commerce," to quote one of the witnesses before the committee.

"It embraces collar buttons and steamships, tooth-brushes and transportation systems, toilet articles and safety-appliance systems, telegraph systems and tools, articles that go on the tables of the people, garments and food-stuffs, patent roads and buildings, inventions which have a restricted use in special fields, and those which affect the great mass. In short, so sweeping are the powers created by the proposed law as to give the district federal courts jurisdiction over all fields of commerce."⁵⁵

How the committee reconciles such a proposal with its professed abhorrence of anything that may ignore and override the jurisdiction of the state courts⁵⁶ it is difficult to conceive.

Economists have long recognized that all the appalling consequences of over-population and starvation conditions have been staved off in the United States during the past twenty years only by the progress of invention.⁵⁷ The result of such a scheme of

⁵³ Report, p. 10.

⁵⁴ Report, p. 9.

⁵⁵ Joseph J. O'Brien, Hearing, No. XXVII., p. 94.

⁵⁶ Report, p. 9.

⁵⁷ "The period since 1891 has been anything but one of impoverishment; and it is no uncertain guess which assigns a reason for this general prosperity. It has been due to two causes, acting together; and both of them must continue to act, if we are destined to escape disaster. The first is production on a vast scale, carrying with it a corresponding increase of efficiency; and the second is improvement in productive

compulsory license, it was graphically shown before the committee, would be to diminish the inventor's market for his invention, to enable any strong competitor to crush its weak rivals, to impede every patent owner in developing and introducing his invention, to retard the patenting of inventions, and to discourage the large-scale invention and industrial experimentation on which civilization depends for solving the increasing problems of existence.⁵⁸

In its zeal to insure the non-enforcement of license restrictions, the committee proposes by the substitute Oldfield bill to enforce solely against patent owners a Draconian code of business practice which is not and never has been imposed upon any other class of property owners. Litigation under the Sherman Anti-Trust Act turns frequently, if not generally, upon close questions of law. By a salutary result of the existing law, property which is not in transit does not become forfeited, in the event that a combination in restraint of trade is found to exist. The substitute Oldfield bill, however, provides that under such circumstances all property in the form of patents involved in such litigation shall be forfeited, while all other forms of property shall remain unaffected. Under the provisions of the bill, the vendor of any patented article becomes a criminal, if he attempts to secure a year's business as a condition of selling to a retailer; if he attempts to hold the retailer to his agreement to buy his patented goods exclusively or to a certain

method — the brilliant succession of mechanical invention and other devices which, in every field of industry, have accomplished again and again what is called 'making two blades of grass grow where one grew before.' . . . Technical improvement is highly indispensable. Without it, and with our increasing population, life on our planet would be unendurable. Stop the succession of inventions that add to our power over nature and you will bring labor soon to a starvation limit. Merely check the rapidity of this technical progress and you will cause grievous hardship." John Bates Clark, Professor of Economics in Columbia University in *The Control of Trusts*, pp. 9-12 (1912).

⁵⁸ See the testimony of Frank L. Dyer, President of Thomas A. Edison, Inc., Hearing, No. II.; of H. Ward Leonard, Chairman of the Legislative Committee of the Inventors' Guild, Hearing, Nos. III. and IV.; of Dr. L. H. Baekeland, President of the American Institute of Chemical Engineers and a member of the Inventors' Guild, Hearing, No. IV.; of Edwin J. Prindle, Hearing, No. IX.; of Samuel Owen Edmonds, Hearing, No. XII.; of Livingston Gifford, Hearing, No. XIV.; of Spencer Miller, Chief Engineer of the Lidgerwood Mfg. Co., Hearing, No. XXIV.; of Frederick P. Fish, Hearing, No. XXVI.; of Walter F. Rogers, President of the Patent Law Association of Washington; and of William W. Dodge, E. W. Bradford and others, Hearing, No. XXVII.

extent; if he attempts to hold the retailer to his agreement to maintain a standard price on the patented goods; if he licenses the use of a delicate patented machine on condition that it be used only with specially prepared supplies or in continuity with specially adapted machinery necessary to insure perfect operation; if he avails himself of the quality of his patented inventions to induce licensees to use his machines, either exclusively or in part, for all their needs; if he agrees with a retailer in a town to sell his patented goods to no one else in the same town or to sell to other retailers only on less favorable terms, in consideration of which the retailer shall push the sale of the goods; or if he sells his patented goods in any particular territory at a less price than he sells elsewhere. Each of these transactions, which good morals and honorable business practice, to-day and from time immemorial, have always sanctioned, is made by the bill conclusive proof of the violation of the Sherman Anti-Trust Act. The fact that the transactions might reasonably be shown to have no tendency to restrain trade cannot save the unlucky patent owner, for the bill expressly provides that "restraint shall be conclusively deemed to have been or to be unreasonable and to be in violation of the provisions of said act"⁵⁹ (*i. e.*, the Sherman Anti-Trust Act) as to any party who performs any of these transactions. The penalty which the patent owner may suffer for doing any of these things is the forfeiture of his patents, a fine of five thousand dollars and a year's imprisonment; and the payment of threefold damages and the costs of suit and attorneys' fees to anyone who comes in within three years thereafter and proves any damage.

The substitute Oldfield bill forbids only patent owners to do these things, and expressly leaves the owners of every other form of property absolutely free to do any of them. Unlucky patent owners caught in the net may reflect that if they had only dealt in unpatented goods, instead of spending time and money developing new inventions, which their patents publish to the world, to the end that in seventeen years the world may use them without cost, they could have avoided all their misfortunes. Is this the way by which Congress seeks to "promote the progress of science and useful arts?"

⁵⁹ Section 5.

Some amendments in the patent law are certainly needed. Few will disagree with the House Committee on Patents that some legislation, other than that proposed in the substitute Oldfield bill, is required, "amendments, specifically in the patent law, and particularly some radical changes in the administration of the patent law, both in the courts and in the Patent Office."⁶⁰ The committee continues: "As respects the courts: two vital changes are essential — the present method of trying patent cases must be abandoned for a new one and a court of patent appeals must be established. . . . Changes should be made in the equipment and organization of the Patent Office to increase its efficiency and to secure for the public and inventors whom it serves the best possible service."⁶¹ By changes of this sort, rather than by the radical innovations proposed in the substitute Oldfield bill, will the patent system of the United States be improved.

Gilbert H. Montague.

NEW YORK CITY.

⁶⁰ Report, p. 21.

⁶¹ Report, pp. 21, 23, 24.

AN EXCEPTION TO THE HEARSAY RULE.

I.

WHETHER it is possible without calling in the aid of legislation to reduce all the rules of evidence, and particularly those dealing with hearsay, to a scientific instead of an historical basis is open to question. Professor Wigmore in his great work ¹ has attempted to do this, and at least in the newer jurisdictions where the outlines of the rules are not yet clearly drawn it is to be hoped that his views may be followed and the desirable result achieved by the courts themselves. Even in the older jurisdictions there are certain rules in the law of evidence which are comparatively modern and have not yet become hardened into fixed principles. One would certainly seem justified in turning the light of reason upon such rules, and it should be permissible to criticize them analytically untrammelled by any historical shackles.

It is the purpose of this article to discuss one of these more recently formulated doctrines, namely, that exception to the hearsay rule which allows evidence to be presented of declarations of a person's intent in order to prove the doing of the act intended. At first thought it scarcely seems consonant with sound reason to admit evidence of John Doe's statement that he intended to go to Boston, for the purpose of proving that he did go; and yet to exclude his statement that he had been in Boston, when offered to prove the same thing. If this result offends our common sense, it behooves us to examine carefully both the hearsay rule itself and this exception to it, in order to discover whether or not these two seemingly opposed doctrines of the law turn out on analysis to be in fact consistent and based on correct legal reasoning.

The first step in such a proceeding is to define the hearsay rule. In order to do this, two questions must be answered: first, what facts are susceptible of being excluded by the hearsay rule? second, are all uses of such facts forbidden?

¹ Wigmore, *Evidence* (1904).

As a preliminary to any attempt to delimit the hearsay rule, it is desirable to consider the reason for having such a rule of exclusion at all. The hearsay rule is the result of the process of separation of the functions of jury and witness. Originally the jury were themselves witnesses. Gradually the custom arose of calling in other special witnesses who had a peculiar knowledge of the transaction, while the jury themselves still used their own knowledge as well as the general knowledge of the community. The formula of the witness at this stage of the law was "*quod vidi et audivi*." "To state what someone else had seen and heard was the function of that someone else, and not of the witness." In time, however, the jury lost even their function of community witnesses and were restricted solely to drawing conclusions; but the old rule still remained, only the original perceiver could testify and second-hand information was not desired.² The modern rational explanation of the rule, according to Professor Wigmore, is the desirability of testing all testimony by cross-examination.³ For there are three possible defects in human testimony: first, inaccurate perception; second, faulty memory; third, untruthfulness. When the testifier can be cross-examined, it is relatively easy to discover whether any of them are present. If, however, a man's declarations may be given in his absence, the danger of these defects makes the testimony of conjectural value. In particular, the third possibility, that of untruthfulness, constitutes a very great objection to receiving such evidence. Because of it the evidence may be as valuable for concealing, as for disclosing, the true facts. The harm done by the reception in some cases of untruthful testimony would be very great; great enough, it is considered, to outweigh the disadvantage of the loss of truthful testimony in other cases, and consequently to justify the exclusion of all testimony subject to the possibility of this defect. The other two defects often cannot possibly be present; for example, the statement of a present fact involves no memory, and the statement of mental condition involves no perception. Furthermore, even when they are present, they are very unimportant in comparison to the danger of untruthfulness, for at the worst they will merely lead to a slight misdescription of the true facts. So that although these further dangers usually

² Thayer, Preliminary Treatise on Evidence, 498-501.

³ Wigmore, Evidence, §§ 1362, 1367.

exist, they are really only incidental; the possibility of untruthfulness is the essential in hearsay, and the true ground for the rule of exclusion. A recent text-book writer treats even this infirmative consideration as of little value, and asserts that it is not sufficient justification for excluding hearsay generally.⁴ It may be questioned, however, whether the difficulty of distinguishing between honest and untruthful hearsay is not practically insurmountable in a system of law where a jury is the trier of fact; and it would seem that this rule, peculiar to Anglo-American law, is to be justified if at all because of that other peculiarity, the existence of a jury.

With this reason for the hearsay rule in mind, let us turn to the first of our questions; namely, what facts *can* be excluded by the hearsay rule? Can utterances alone be hearsay, and can all utterances be hearsay? As to the first part of this question, it is clear that non-verbal conduct might well be excluded; for example, waving a signal-flag or talking in sign-language is really one form of speech. On the other hand, some human conduct is clearly admissible; for example, the flight of an accused may be shown to prove his guilt.⁵ What is the distinction? In each case the conduct is used to evidence a belief in order to prove the fact believed, and so in each case there seems to be a possibility of the same three defects which are usually present in hearsay. Yet there is a difference, which lies in this: in the first example the conduct was intended to convey thought, in the second it was not. When there is no intention to communicate to any one there is very much less chance that the act was done in order to deceive, and hence the third and fundamental danger in admitting hearsay does not here exist, or at least not so strongly. Furthermore, as a rule the fact believed in this latter class of cases is a simple one, and hence the first and second dangers are decreased. Accordingly, there appears to be a sound distinction between the cases, which may be formulated in the statement that only conduct apparently intended to convey thought can come under the ban of the hearsay rule. It is to be noted that the test employed is apparent intent, for it is obviously impossible to apply an internal standard in this con-

⁴ Chamberlayne's *Best on Evidence*, 3 ed., 447, 448.

⁵ *State v. Rand*, 33 N. H. 216 (1856); *Commonwealth v. Tolliver*, 119 Mass. 312 (1876).

nection.⁶ With this test in mind we can answer the other part of the question put above: can all utterances be hearsay? As a rule, yes, for most utterances are intended to be a means of communicating thought; but in certain cases, no, as, for example, that of instinctive cries of pain, which according to the test suggested would not be hearsay.⁷

Having now seen what facts are susceptible of being excluded by the hearsay rule, our second question is, does that rule prevent every use of those facts? And if not, what use is forbidden? Obviously certain uses are not prevented, as when the saying of the words is in issue as it is in slander, or again when the speaking of the words is offered to show that the speaker was alive. The essential characteristic of hearsay is not present in such a use of the words; "the probative force" does not "rest in whole or in part on the credibility of the speaker," and so there is no possibility of the danger of untruthfulness being present.⁸ Since the reason for the hearsay rule is the existence of this danger, Greenleaf's definition

⁶ This conclusion would appear to be in accord with the authorities, although the distinction is not clearly made. Non-verbal conduct is generally admissible. See Phipson on Evidence, 5 ed., 207. Professor Wigmore's view does not seem clear. In one section (§ 459) he admits conduct and says that "the hearsay rule excludes only deliberate utterances in terms affirming a fact." In another section (§ 266 c), however, he takes the position that "conduct evidence as supporting an inference of the person's belief and thus of the fact believed, is in general . . . declared inadmissible, as being open to construction as assertions and therefore as mere hearsay. . . . Whatever instances of opposite tendency may be noted in the following sections and however well-founded they may be in a given case, they must be regarded as casual and unusual." The learned author then cites in §§ 268-293, 459-464, innumerable decisions of the "opposite tendency," and the only case cited in support of the supposed rule is *Wright v. Tatham*, 5 Cl. & F. 670 (1838), where the sending of letters to a testator by various persons was not admitted to show their belief in his sanity and thus the fact of his sanity. Whether or not in this case there is a hearsay use of evidence is discussed below; but that such evidence is susceptible of a hearsay use upon the test suggested is clear, for letters are apparently intended to convey thought.

Mr. Gulson (*Philosophy of Proof*, §§ 361, 362) seems to consider it impossible to draw any line and would exclude all such conduct; and it must be admitted that even on the test suggested it is a troublesome question to decide some of the cases he puts, as, for example (§ 197), when the position of the hands on the face of a clock is used as a ground of inference to the real time.

⁷ Citation of authorities would be useless here, for even if such utterances are classified as hearsay, they are still admissible under the exception to the hearsay rule to be discussed later.

⁸ Chamberlayne's *Best on Evidence*, 3 ed., 444.

of hearsay as "that kind of evidence which does not derive its value solely from the credit to be given the witness himself, but rests also, in part, on the veracity and competency of some other person," seems to be a correct expression of that use of evidence which is forbidden by the hearsay rule.⁹

A problem is presented in the application of this definition by a distinction which has been taken by Professor Wigmore. He declares that it is a hearsay use of evidence only when an express assertion is offered to prove the fact asserted. He then deduces from this definition that if the assertion "I did X" is offered to prove my belief at the time of speaking (supposing that under the issue my belief as to the doing is material), it is not a hearsay use; whereas if the statement "I think I did X" or "I know I did X" is offered for a similar purpose, it is a hearsay use.¹⁰ It is submitted with deference that this definition is unsound and that such a distinction is an over-refinement.¹¹ For in the first place some implied assertions are clearly hearsay, as, for example, non-verbal conduct intended to express thought, where there is of course no express assertion;¹² or again the common case of an incomplete statement such as a sailor's cry of "land," which only impliedly asserts "I see land." If such implied assertions are recognized as hearsay, as they must be, the definition given above, limiting hearsay to express assertions, must be incorrect. Furthermore, how can the implied assertions of present thought in "I did X" be kept out of the category of hearsay if the above implied assertions are admitted?¹³ There would seem to be no logical means of

⁹ 1 Greenleaf on Evidence, 16 ed., § 99.

¹⁰ Wigmore, Evidence, §§ 266, 459, 1715, 1788, 1790.

¹¹ Here again citation of authorities is not very helpful, for whether such statements are hearsay or not, they would be generally admissible under the hearsay exception to be discussed presently.

¹² As Wright v. Tatham, *supra*.

¹³ In the cases of non-verbal conduct and incomplete statements it is true that there is no express assertion at all, and that the implied assertion is the one primarily intended to be made. But these are really not different from the statement "it will stop raining in an hour." In addition to the express assertion, there is in that case a necessary implication of an assertion that it is now raining and will continue to rain for an hour. As far as the intent of the speaker is concerned, while it is principally to give his thought as to the cessation of the rain, it is incidentally without doubt to assert its present existence and continuance. It is due only to a chance use of words that he did not say "the rain that is now falling will continue for an hour," in which case the express and implied assertions would have changed places, while the speaker's

making such a distinction, and accordingly, if the definition of a hearsay use of evidence is to be cast in terms of assertion, that phrase must be used to mean implied as well as express assertion, and the statements "I did X" and "I think I did X" must be similarly treated. Moreover, if we turn from logical analysis to the demands of policy, still less excuse appears for a definition which leads to such a distinction. Judged by the reason for the hearsay rule the use of the assertion "I did X," and that of the assertion "I think I did X," in order to prove belief at the time of speaking, are equally obnoxious. For the sole danger that exists in the case of assertions as to mental condition is the third and only important one, the possibility of untruthfulness; and that danger is of course identical in each of the two cases. For if the speaker is lying, the thing about which he is lying is in each case his present belief, although in the one case, owing to an elliptical manner of speech, he omits any express reference to his thought. Any differentiation between the cases therefore, whether in treatment or analysis, would be a complete departure from the spirit of the hearsay rule and a formalism unworthy of a rational analysis of the law of evidence.¹⁴

If, then, the true hearsay use is that which employs as a step in the reasoning a reliance upon the sincerity of the speaker, a question still remains as to the distinction between testimonial and circumstantial methods of employing hearsay evidence. Some confusion has arisen in this connection, chiefly because these terms have not been clearly defined. Whenever an assertion of a past

intent would have been undoubtedly the same. It would seem, therefore, that if in the above admitted cases implied assertions are hearsay, the implied assertions in the case just discussed must be similarly treated. And if that conclusion is reached the same result would have to follow in the case of implied assertions of present thought. For there again there is a necessary implication, namely, that since I now say I did X, I now think I did X; and there is at least an incidental intent to assert that present thought. That such an intent actually exists to a greater or less extent is apparent from the impossibility of distinguishing in that respect such assertions as "I know X happened," "I am certain X happened," "X certainly happened," "X really happened," and "X did happen."

¹⁴ This criticism of the express assertion view would bring many cases classified by Professor Wigmore in his chapter on verbal acts, *i. e.*, conduct not hearsay, under the hearsay rule: but most of them would still be admissible under the exception as to declarations of intention to be discussed presently.

external fact is used as evidence of the proposition asserted, there is an inference, first, that since the speaker says it, he believes it now; second, that since he believes it now, he believed it then; third, that since he believed it then, it happened.¹⁵ The first inference from assertion to belief may be based on any of three grounds: one, the truthfulness of the particular speaker; two, the truthfulness of men in general; three, the particular circumstances under which the assertion was made. Strictly this process is circumstantial reasoning, and all uses of hearsay might therefore be called circumstantial. It is, however, desirable to distinguish human testimony because of its peculiar characteristics noted above from other evidence, and it seems convenient to restrict the phrase "circumstantial" so as not to include any truly testimonial use; that is, any use employing the first inference that since the speaker says it he believes it now. Such a use of the words "circumstantial" and "testimonial" has the virtue of making a distinction in terminology between kinds of evidence which differ fundamentally, and of following the line of demarcation drawn by the hearsay rule.¹⁶

This definition of the term is not, however, always followed. According to Professor Thayer, there is a circumstantial use of a statement "whenever the circumstances of the case alone were enough to entitle it to credit, irrespective of any credit reposed in the speaker."¹⁷ Such a use of the term, it is submitted, is undesirable, for neither in analysis nor in treatment can a distinction be made between the three possible grounds, noted above, for the inference from assertion to belief; namely, the truthfulness of the speaker, the truthfulness of men in general, or the guarantee of trustworthiness to be found in the surrounding circumstances. Even Professor Thayer makes clear, however, that no matter what

¹⁵ The possibility that each of these three inferences may be wrong constitutes the three dangers in hearsay discussed above.

¹⁶ An example of what is thus properly circumstantial evidence is the use of the assertion "I am alive" to prove that the speaker was then alive. Here, although the inference is from the assertion to the fact asserted, it is not via the inference from assertion to belief. The mere speaking is enough for the direct inference to the fact of the speaker's existence, and his belief is immaterial. Of course the fact that evidence is susceptible of a hearsay use will not prevent its reception when offered for a valid circumstantial use.

¹⁷ Preliminary Treatise, 522.

terms be employed, any inference from assertion to belief is forbidden by the hearsay rule.¹⁸

Professor Wigmore uses the term in still a different manner, and his difference in analysis has led to a difference in treatment. As noted above, he considers the inference from an assertion of a fact to the assertor's belief to be a circumstantial use of the evidence, and therefore conceives that it is not barred by the hearsay rule; although even he admits that if a second inference were then taken, from the belief to the fact asserted, there would be an evasion of the hearsay rule, and hence that this inference may not be made.¹⁹ It may be queried, if the first inference were really circumstantial and the evidence not barred by the hearsay rule, — a problem discussed above, — how the mere making of a second and clearly circumstantial inference could be prevented by the hearsay rule. It is submitted that only by adopting the definition of the terms suggested above can clear thinking on this subject be attained.

Summarizing the answer to our second question, what is a hearsay use of a statement, we can say that it exists whenever the probative force of the words offered in evidence depends upon the making of an inference from an express or implied assertion to the belief of the assertor in the fact asserted, or, more briefly, whenever it depends on the assumption that the speaker is telling the truth.

II.

Having now endeavored to mark off the field of the application of the hearsay rule, we are better prepared to attack our original problem: does the exception to the hearsay rule allowing in evidence declarations of intent in order to prove the doing of the act intended constitute a valid exception?

At the outset this exception must be distinguished from a closely analogous one, namely, that declarations of mental condition are admissible whenever a mental state is in issue.²⁰ The reason for

¹⁸ Preliminary Treatise, 523; Legal Essays, 265.

¹⁹ Wigmore, Evidence, § 267.

²⁰ Pain: *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832 (1886); *Goodwin v. Harrison*, 1 Root (Conn.) 80 (1781). Emotion: *Robinson v. State*, 57 Md. 14 (1881); *Ash v. Prunier*, 105 Fed. 722 (1901). Motive: *Rives v. Lamar*, 94 Ga. 186, 21 S. E. 294

this latter exception lies in the nature of the thing to be proved; circumstantial evidence is comparatively inadequate to reveal internal states. The person himself alone really knows them, and so by necessity resort must be had to his statements concerning them. Of course the danger of untruthfulness is present, but it is lessened by a power of discretion in the court to refuse the evidence if the statements were made under circumstances at all suspicious; and whatever danger still remains is outweighed by the need of the evidence. An analysis of this rule yields four subdivisions: (1) statements of present mental condition are admissible to prove that mental condition when in issue; (2) statements of present mental condition are admissible to prove inferentially future mental condition when in issue; (3) statements of present mental condition are admissible to prove inferentially past mental condition when in issue; (4) statements of past mental condition are admissible to prove past mental condition when in issue. The propriety of the inference in the second and third classes is undoubted.²¹ No real distinction can be made between any of the classes, although it has been argued that the statements in the first three classes are more apt to be truthful, and those in the fourth least apt to be so; and accordingly these last are excluded by many courts, particularly when they are statements as to past pain.²² It is submitted that the classes cannot be distinguished on that ground, for a statement "I think that X happened" is no more trustworthy to prove present thought if in issue than a statement "I then thought X happened" is to prove the past thought. Each statement is sufficiently untrustworthy to be excluded were the issue the happening of X; and it is difficult to see how for our present purpose a greater probability of truthfulness can be found in the one than in the other. Furthermore, on the view suggested above, the statement "X happened" contains equally implied assertions of present and of past mental condition, both of which

(1894); *Steketee v. Kimm*, 48 Mich. 322, 12 N. W. 177 (1882). Intent: *Ridley v. Gyde*, 9 Bing. 349 (1832); *Carter v. Gregory*, 8 Pick. (Mass.) 164 (1829); *Cole v. Inhabitants of Cheshire*, 1 Gray (Mass.) 441 (1854); *Inhabitants of Gorham v. Inhabitants of Canton*, 5 Me. 266 (1828). See also cases cited in *Wigmore, Evidence*, §§ 1718, 1729, 1730, 1783, 1784.

²¹ *Wigmore, Evidence*, § 1737, 2 b.

²² *Lush v. McDaniel*, 13 Ired. (N. C.) 485 (1852); *Girard v. Kalamazoo*, 92 Mich. 610, 52 N. W. 1021 (1892). See also cases cited in *Wigmore, Evidence*, § 1722 b.

are obviously of the same degree of truthfulness. However, it is undoubtedly true that statements of present pain are more reliable than those of past pain. The chief ground of the distinction is that statements of present pain are usually made under circumstances which tend to guarantee their truthfulness. But it is to be noted that the effect of such reasoning is merely to add to the probability of truth of the statements of present pain and not to lessen such probability in statements of past pain, and that these last still remain of the same degree of trustworthiness as statements of other present or past mental conditions, and hence should be admissible, at least as far as this argument is concerned. The authorities excluding them might be supported on the distinction that statements of past pain are peculiarly subject to the defect of faulty memory, and that while in other cases of the third and fourth classes the step, that since the speaker now believes a certain thing, therefore he then believed it, can be taken with safety; yet in this case it should not be taken, because the danger of incorrect memory is unusually great, since it is almost impossible to remember the details of past suffering in anything more than the roughest outline without making many errors. It is suggested, however, that the more flexible rule allowing in evidence even declarations of past pain whenever made under circumstances of naturalness and without apparent motive to deceive would be a preferable one.

This, then, is the recognized exception: declarations of mental condition are admissible whenever a mental state is in issue. But in the case of *Mutual Life Insurance Co. v. Hillmon* ²³ the Supreme Court took a further step and allowed in evidence declarations of intention when the fact in issue was not a mental condition, but the act intended. And it is the validity of that step that it is here sought to question.

At first sight this step perhaps appears no step at all. If declarations of intention are admissible to prove future intent, and if that future intent is evidence of a future act, it follows that declarations of intent can come in to prove the act intended. Yet is that a necessary conclusion? Two arguments oppose it.

In the first place, the reason for the exception as to statements of mental states when the mental state is in issue is, as we have seen,

²³ 145 U. S. 285 (1892).

the peculiar need of them. We *had* to prove the mental state; in order to do that satisfactorily we were compelled to make an exception to the hearsay rule and let in declarations as to it. But when the mental state is not in issue the aspect of the matter is entirely changed. Now the fact we *must* prove is an external act. And intention to do that act is only one of various possible methods of proving that the act occurred; and a weak one. The intention is not a necessary fact. Therefore the declarations are not necessary. Accordingly no principle of necessity exists in such cases, and there is no rational justification for making an exception to the hearsay rule.

The argument just made is purely negative. Still stronger is the affirmative reasoning that if such evidence is admissible, logically all hearsay would be. The steps in such an argument are as follows:

1. If declarations of intention are admissible to prove a future act, logically they would be admissible to prove a past act. For the inference from a present intent to a past intent can under proper circumstances be just as sound as the inference from a present intent to a future intent. An illustration of such a case is a declaration by a testator as to the disposition which he intends to make of his property, offered as evidence of the contents of a will made previously. The admissibility of such declarations would seem to follow necessarily from the Hillmon case.

2. If this step is taken, logically declarations of a present belief as to a past act would be admissible to prove a past act. If the statement "I intend to leave A. \$1000" is evidence that a will which I made last week contained such a bequest, is not the statement "I know I left A. \$1000" equally admissible for the same purpose? Each is a statement of present mental condition, the only distinction being the purely formal one that one is intent and the other belief; surely upon that no real difference can be based. Further in each case there is a similar inference from present to past mental state; which inference is, if anything, stronger in the case of memory than in that of continuing intent. Finally, a distinction might be taken that statements of intention are more apt to be trustworthy than are statements of belief as to a fact. For such an argument it is, however, difficult to find support. Cases are familiar in the law of deceit where the misrepresentation is as

to intention, and it would be rash to assert that such occur less frequently in proportion to the total number of statements of intent made, than representations as to facts occur in proportion to the total number of assertions of fact. *A priori* there seems no reason to believe that mankind has a higher sense of honor in regard to statements of intent than as to other statements; nor is it possible to assert that there are fewer motives for lying as to one's intent than as to a fact.²⁴ In every respect the cases are alike, and on any rational basis it would therefore seem necessary to admit the second statement if the first comes in.

3. Having progressed thus far, the gates are open wide enough to admit all hearsay. For if hearsay declarations are admissible to prove past acts of the speaker, it would seem logically necessary to admit them in order to prove past facts of his observation. It might be argued that one of the incidental defects of hearsay, inaccurate perception, is present to a stronger degree in the latter class. Yet it is submitted that even here there is no substantial distinction, for the statement of an act such as "I went to 25 Tremont Street" really involves as much danger of inaccurate perception as the statement of any fact of past observation.

It appears, therefore, that by a process of logical deduction we have reached the conclusion that to follow the Hillmon case consistently leads to the abolition of the hearsay rule. It is impossible, if the law of evidence is to be a rational science and not merely a collocation of arbitrary historical rules, to have the Hillmon case and the hearsay rule stand side by side. It is submitted that the courts have failed to see where the Hillmon rule leads, because of their neglecting to make the absolutely necessary distinction between declarations of intent to prove a future intent in issue and similar declarations to prove a future act. If any position is

²⁴ It may be noted that if a man is trying to lie about a past act, even such as the contents of a will, he usually will state the fact and not his present continuing intent. It does not follow from that, however, that statements of fact are more apt to be untrustworthy than statements of intention. For even if the speaker is trying truthfully to tell the contents of a past will, he is apt to use the form of stating the past fact rather than the continuing intention. In other words, stating present continuing intention, when the act has been done although its effect is to come in the future, is a rather unusual way of expressing oneself; and since there is a smaller total of such statements, there is a smaller number of lying statements of that kind. Yet the probability of any particular statement being untruthful would seem to be the same, whether the statement is of intention or of fact.

to be taken short of letting in all hearsay, the line of demarcation must be drawn with a firm hand at this point.

It may be said that this reasoning leads to a harsh result; that to exclude the evidence in the Hillmon case would have been to keep out the truth; and that in reality the evidence was as much needed there as in most cases where mental condition is in issue. The answer to this is short: the hearsay rule often reaches the same regrettable result of excluding truth, and often when it is most needed. The quarrel is not with the reasoning, but with the hearsay rule itself. Perhaps, as has been noted above, the dangers in hearsay are not really so great as to overbalance the disadvantage of losing the evidence. It may be that instead of being a rule of exclusion it should be made a rule of preference, and in cases like the Hillmon case, where the evidence is greatly needed and none other can be obtained, hearsay should be admissible.²⁵ But that is a speculative problem. Without legislation we cannot expect to eliminate the hearsay rule. And since we have it, any exception to it other than those which exist as inherited idiosyncrasies of the law of evidence must be based on some rational ground; we cannot say arbitrarily that in a certain class of cases where the word "intend" is used, that we will not apply the rule. That is a mere stultification.

III.

In conclusion, a reference to the authorities is necessary. There are three classes of cases which appear to support the Hillmon rule:

1. Declarations of a deceased testator are admissible in evidence in various ways:

a. "In the well-known case of equivocation, extrinsic utterances of intention are received in aid of construction."²⁶ Here obviously the intention is in issue, and the authorities which admit both contemporaneous declarations and those uttered shortly before or

²⁵ It may be noted in this connection that in Massachusetts by statute declarations of deceased persons are admissible in evidence. Mass. Rev. Laws, 1902, c. 175, § 67. See Thayer, *Legal Essays*, 303.

²⁶ Thayer, *Cases on Evidence*, 2 ed., 641, note; Wigmore, *Evidence*, § 2472, and cases there cited.

after the execution of the instrument are within the proper exception as to declarations of intention which has been outlined above.

b. Statements of a present intent to revoke whether made simultaneously with, subsequently to, or prior to the act of revocation, and subsequent statements of a past intent to revoke, are admissible when the act of destruction or cancellation by the testator is conceded.²⁷ Here again intent is the issue and the result is thoroughly sound.

c. Ante-testamentary statements of intent have been admitted to prove a future external fact, such as the execution of a will, its contents, or an act of revocation. The principal case in support of this doctrine is *Doe d. Shallcross v. Palmer*.²⁸ The Supreme Court of the United States, however, in *Throckmorton v. Holt*²⁹ refused to follow this rule. Referring to such declarations the court said: "After much reflection on the subject, we are inclined to the opinion that the principles upon which our law of evidence is founded necessitate their exclusion."³⁰

d. Post-testamentary statements have been similarly admitted to prove a past fact, it being apparently immaterial whether they are in the form of stating an intent or a past fact, a distinction discussed above. *Sugden v. Lord St. Leonards*³¹ is the leading case for this view, but the weight of authority is against it.³² Logically these last two classes of cases (*c* and *d*) are, as suggested above, indistinguishable; and the Supreme Court in *Throckmorton v. Holt*, while discussing ante-testamentary and post-testamentary

²⁷ *Powell v. Powell*, L. R. 1 P. & D. 209 (1866); *Whitney v. Wheeler*, 116 Mass. 490 (1875); *Pickens v. Davis*, 134 Mass. 252 (1883); *Stewart v. Stewart*, 177 Mass. 493, 59 N. E. 116 (1901); *Lawyer v. Smith*, 8 Mich. 411 (1860); and cases cited in *Wigmore, Evidence*, §§ 1737, 1782.

²⁸ 16 Q. B. 747 (1851). *Accord*: *Gould v. Lakes*, L. R. 6 P. D. 1 (1880); *Hope's Appeal*, 48 Mich. 520; and cases cited in *Wigmore, Evidence*, § 112.

²⁹ 180 U. S. 552 (1900). This decision is of course inconsistent with the *Hillmon* case.

³⁰ 180 U. S. 552, at 573.

³¹ L. R. 1 P. D. 154 (1876).

³² *Quick v. Quick*, 3 Sw. & Tr. 442 (1864); *Boylan ads. Meeker*, 28 N. J. L. 274 (1860). See also cases cited in *Wigmore, Evidence*, § 1736; and *Phipson on Evidence*, 5 ed., 305-309. In this connection it is to be noted that where the fact to be proved is undue influence or the like, then mental condition is really an issue, and declarations as to it are, as seen above, properly admissible. When insanity is the issue, the declaration might be similarly classified; yet in most cases probably no hearsay question is involved, for the statements are valuable circumstantially apart from any reliance on the veracity of the speaker.

declarations of intention, declares "that there is no good ground for a distinction" between them.³³ It is submitted, therefore, that if the cases opposed to *Throckmorton v. Holt* stand for anything they must be classed with *Sugden v. Lord St. Leonards* as an anomalous exception which allows in all hearsay in the case of deceased testators; a justification for which anomaly it is hard to find.

2. In the United States very generally threats by the deceased against one charged with homicide are admissible under the issue of self-defense to prove who was the assailant, even though they were uncommunicated to the accused.³⁴ This rule seems limited by the requirement of some other evidence of an act of aggression by the deceased, and its outlines in general differ in different jurisdictions. The rule appears to have arisen from a confusion of the doctrine of *res gesta*, and that of communicated threats, admissible under a plea of self-defense to show the defendant's reasonable belief of danger of attack — this last obviously a truly circumstantial use.

3. Finally, apart from the authorities following the *Hillmon* case, there are in the United States a few scattering precedents admitting intention to prove the act intended, mostly cases where the issue involves the whereabouts or conduct of a victim of a crime.³⁵ They are based wholly on the *res gesta* doctrine, and in nearly all of them the doctrine seems to be misapplied.³⁶

It would seem, therefore, that the previous authorities did not necessitate or justify the broad rule laid down in the *Hillmon* case. And if there is any force in the arguments set forth in the preceding pages, there is no foundation in reason upon which such an exception to the hearsay rule can be based.

Eustace Seligman.

NEW YORK CITY.

³³ 180 U. S. 552, at 572.

³⁴ *People v. Arnold*, 15 Cal. 476 (1860); *Stokes v. People*, 53 N. Y. 164, 174 (1873); *Wilson v. State*, 30 Fla. 234, 11 So. 556 (1892); and cases cited in *Wigmore, Evidence*, §§ 110, 111.

³⁵ *State v. Smith*, 49 Conn. 376 (1881); *Hunter v. State*, 40 N. J. L. 495 (1878); *Timmons v. Timmons*, 3 Ind. 251 (1851); *State v. Dickinson*, 41 Wis. 299 (1877).

³⁶ For a discussion of that aspect of such statements, particularly with reference to the English cases, see *Phipson on Evidence*, 5 ed., 53.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, <i>President.</i>	WILLIAM S. WARFIELD, III, <i>Treasurer.</i>
MAXWELL BARUS,	MAURICE HIRSCH,
RALPH O. BREWSTER,	ALLEN T. KLOTS,
HARVEY H. BUNDY,	VAN S. MERLE-SMITH,
EDMUND BURROUGHS,	ABBOT P. MILLS,
PRESCOTT W. COOKINGHAM,	LEROY P. PERCY,
E. MERRICK DODD, JR.,	ROBERT W. PERKINS, JR.,
OSCAR R. EWING,	JAMES J. PORTER,
JOHN W. FORD,	VINCENT STARZINGER,
C. PASCAL FRANCHOT,	G. TRACY VOUGHT, JR.,
ARTHUR A. GAMMELL,	BOYKIN C. WRIGHT,
	FRANCIS S. WYNER,

THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1901-02	1902-03	1903-04	1904-05	1905-06	1906-07
Res. Grad.	1	—	4	1	1	—
Third year	149	167	180	182	192	190
Second year	190	196	201	232	216	199
First year	229	228	293	285	243	243
Specials	59	49	60	58	64	62
	628	640	738	758	716	694

	1907-08	1908-09	1909-10	1910-11	1911-12	1912-13
Res. Grad.	2	—	—	2	3	6
Third year	171	169	187	178	219	176
Second year	198	207	191	238	217	186
First year	280	244	311	296	289	287
Unclassified	—	—	—	82	76	84
Specials	63	64	70	3	4	5
	714	684	759	799	808	744

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts: —

Class of	HARVARD GRADUATES.		Outside of New England.	Total.
	From Massachusetts.	New England outside of Massachusetts.		
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93
1911	35	5	18	58
1912	36	10	28	74
1913	42	7	33	82
1914	31	6	16	53
1915	24	4	21	49

GRADUATES OF OTHER COLLEGES.				
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153
1911	26	29	104	159
1912	38	33	150	221
1913	18	27	151	196
1914	27	37	151	215
1915	28	29	165	222

HOLDING NO DEGREE.					
Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280
1911	12	1	14	27	244
1912	7	2	7	16	311
1913	5	—	13	18	296
1914	15	—	6	21	289
1915	8	—	8	16	287

As the sixteen Harvard seniors in the first-year class have in each instance completed the work required for the A.B. degree, all members of the class are virtually college graduates. The same is true of practically the entire school. Of the eighty-four unclassified students twenty-nine have entered this year, and of these, twenty-two are graduates of a college or university, and seven are graduates of law schools.

One hundred and thirty-six colleges and universities have representatives now in the school, as compared with one hundred and forty-five last year and one hundred and thirty-eight the previous year. In the first-year class eighty-four colleges and universities are represented as follows:—

Harvard 65; Yale 27; Princeton 26; Dartmouth 18; Brown 8; Bowdoin, University of California, Williams, 6; University of Arkansas, University of Michigan, University of Minnesota, University of Pennsylvania, University of Virginia, 4; Amherst, Bates, Cornell University, Ohio State University, University of Texas, 3; Boston, Carleton, Clark, Colorado, Fordham University, University of Georgia, Holy Cross, Indiana University, University of Kansas, University of Kentucky, Kenyon, Knox, Leland Stanford Jr. University, Louisiana State University, University of Nebraska, University of North Carolina, University of Oregon, Rutgers, Trinity (Conn.), Tufts, Wake Forest, Washington and Jefferson, University of Wisconsin, 2; Acadia, Alabama, Polytechnic Institute, University of Alabama, Albright, Allegheny, Butler, Catholic University of America, Central University, Charleston, Coe, Colgate University, DePauw University, Doane, Earlham, George-

town, Grinnell, Gustavus Adolphus, Hampden-Sidney, Hanover, Hastings, Hendrix, University of Illinois, Iowa State, University of Iowa, Johns Hopkins University, Lafayette, Lake Forest, Loyola University, McGill University, Newberry, University of New Brunswick, Pomona, Redfield, Roanoke, University of Rochester, St. John's (Md.), St. Lawrence University, University of the South, University of South Carolina, Union, University of Utah, Wesleyan University (Conn.), Wheaton, Wooster University, 1.

THE CONSTITUTIONALITY OF THE COMPULSORY ASEXUALIZATION OF CRIMINALS AND INSANE PERSONS. — On the theory that modern scientific investigation has demonstrated that idiocy, insanity, and criminality are hereditary, several states have recently passed statutes providing for the compulsory asexualization of the inmates of insane asylums and state prisons in cases where it seems advisable to a board of medical examiners.¹ The application of this provision to others besides criminals and the manner and purpose of its imposition make it clear that it should not be regarded as a punishment but as an exercise of the police power. This power certainly enables the state to take some measures to protect itself against the birth of undesirable citizens, since limitations on the right to marry have been upheld on this ground.² Furthermore, the fact that this purpose is achieved by performing an operation is not a fatal objection, for it is clear that a state can inflict physical injury on individuals for the protection of society. Compulsory vaccination laws, for instance, have been upheld,³ and the operation of vasectomy, at least, is hardly more serious than vaccination.⁴ If, therefore, there is a probability that the persons to be operated upon will produce insane or degenerate offspring, the statutes are constitutional. Since the insanity of lunatics is generally inherited,⁵ the statutes, in so far as they apply to lunatics, would thus seem to be valid.⁶

With regard to criminals, however, the statutes are less easy to sustain. The researches of criminologists have demonstrated that a large

¹ IND., LAWS, 1907, c. 215; CONN., PUB. ACTS, 1909, c. 209; CAL., STAT., 1909, c. 720; IA., LAWS, 1911, c. 129.

² *Lonas v. State*, 3 Heisk. (Tenn.) 287; *State v. Gibson*, 36 Ind. 389; *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604.

³ *Morris v. Columbus*, 102 Ga. 792, 30 S. E. 850; *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358.

⁴ See 27 MEDICO-LEGAL JOURNAL, 134. Vasectomy is a comparatively simple and painless operation consisting of the cutting into and binding up of a small portion of the vas deferens. It effectively sterilizes the subject but does not impair his health or take away his sexual instincts.

⁵ See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 168.

⁶ The right of the state to confine insane persons in asylums is clearly established. *Dowdell*, petitioner, 169 Mass. 387, 389, 47 N. E. 1033, 1034. This right has sometimes been based on the state's authority to care for the helpless. See *Dowdell*, petitioner, *supra*; *Chavannes v. Priestly*, 80 Ia. 316, 320, 45 N. W. 766, 768. In some cases, however, it is certainly based also on the state's right to protect society. See *Shenango v. Wayne*, 34 Pa. St. 184, 186; *Keleher v. Putnam*, 60 N. H. 30, 31. Preventing the procreation of lunatics is merely another method of exercising this right of social protection.

number of criminals have an inborn and hereditary tendency to crime,⁷ but such criminals probably form only a minority of the inmates of penal institutions.⁸ Therefore mere conviction of crime is insufficient to justify society in taking this drastic means of protecting itself against the criminal. Asexualization can only be justified in the case of born criminals,⁹ and unfortunately in the present state of scientific knowledge it seems impossible to distinguish most born criminals from criminals by acquired habit.¹⁰ Therefore born criminals who cannot be proved to be such must be granted immunity. However, there are probably some criminals whose degenerate character can be ascertained, and if a statute can be so drawn as to limit its operation to such as these it should be constitutional.¹¹

It is possible, however, for a legislature to change the aspect of the constitutional question by imposing sterilization as a punishment for crime.¹² As such it is not unconstitutional unless cruel and unusual. A recent case holds that vasectomy is not a cruel¹³ punishment for statutory rape.¹⁴ *State v. Feilen*, 126 Pac. 75 (Wash.). The scope of the provision against cruel punishment has never been clearly defined, but it certainly prohibits torture,¹⁵ and, looked at apart from its purpose,

⁷ See FERRI, CRIMINAL SOCIOLOGY, 28; LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 151; DUGDALE, THE JUKES.

⁸ Ferri estimates that born and habitual criminals together form about forty per cent of the total. See FERRI, CRIMINAL SOCIOLOGY, 18.

⁹ The only objection which can be made to the legitimate children of habitual criminals is that they are likely to be reared in an atmosphere of crime. This is merely an inference, and if it proves correct the state can take them from the custody of their parents. See *Van Walters v. Board of Children's Guardians*, etc., 132 Ind. 567, 569, 32 N. E. 568, 569. The legislature clearly has no power to enact laws based on the principle that no one has a right to have children unless he can bring them up in an ideal environment.

¹⁰ See SALEILLES, INDIVIDUALIZATION OF PUNISHMENT, 129.

¹¹ Inasmuch as it is very difficult to restrain the powers of the medical examiners within proper limits, the attempt to pass this sort of legislation at present seems inadvisable. The common provision that the operation may be performed whenever a majority of the examiners "decide that procreation would produce children with a tendency to disease" would seem to give dangerously wide powers to examiners who held extreme views as to the hereditary nature of crime; and yet it is hard to suggest a more satisfactory phraseology.

¹² Although the purpose of the statute is not to avenge or prevent a particular crime, but rather to reduce the number of criminals, it would seem that since it provides for sterilization as part of the sentence imposed upon conviction of crime it must be regarded as punishment. Cf. *State v. Ray*, 63 N. H. 406. See *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413, 419, 36 N. E. 76, 78. *Contra*, *Prescott v. State*, 19 Oh. St. 184.

¹³ The word "unusual" which is generally linked with "cruel" is not in the Washington constitution. WASH. CONST., Art. I, § 14. Its omission is not important, since it is always construed with cruel. *Storti v. Commonwealth*, 178 Mass. 549, 60 N. E. 210.

¹⁴ The precise crime of which the defendant was convicted was "the carnal abuse of a female person under the age of ten years." WASH., REM. & BAL. CODE, §§ 2287, 2436.

¹⁵ See *Wilkerson v. Utah*, 99 U. S. 130, 136; *State v. Williams*, 77 Mo. 310, 312. Some courts hold that a punishment may also be cruel because excessive. *State v. Driver*, 78 N. C. 423; *Weems v. United States*, 217 U. S. 349, 30 Sup. Ct. 544. *Contra*, *Aldridge v. Commonwealth*, 2 Va. Cas. 447. Since rape may be punished by death, sterilization can hardly be regarded as an excessive penalty. *Rayna v. State*, 75 S. W. 25.

vasectomy is a mild form of torture. The fact that there is a rational purpose behind it makes it doubtful, however, if it can be said to shock public feeling, which has sometimes been laid down as the test of cruel punishment.¹⁶ Yet, in the case of those convicted of some of the crimes included in the Washington statute, the act authorizes the asexualization of persons against whom society is not in need of this protection.¹⁷ As to them the punishment seems cruel, and the statute which imposes it unconstitutional. At all events, it is thoroughly objectionable, since it imposes as a penalty for certain classes of crime a treatment which is justified, if at all, only by the physical nature of certain criminals.

EFFECT OF RECEIVERSHIP OF LESSEE RAILROAD ON THE LEASE. — It frequently happens in this country that one public service company with legislative permission leases all of its property to a new company which assumes its debts and obligations, the lessor remaining in existence but no longer actively engaging in business. A peculiar situation arises in such a case when the lessee railroad or street railway goes into the hands of a receiver.¹ A reasonable time to determine the desirability of continuing a lease is granted to a receiver as essential to the proper performance of his functions.² And since he cannot split up the lease, his decision relates back to his appointment. If he reject the lease, the lessor has a provable claim against the estate for the stipulated rental accruing during the trial period.³ Or the lessor may, at his option, charge the receiver with the reasonable rental value of the property for that time upon quasi-contractual principles.⁴ This must mean that the lessor

¹⁶ See COOLEY, CONSTITUTIONAL LIMITATIONS, 473; *State v. Becker*, 3 S. D. 29, 41. Furthermore, the apparent theory of the statute that the crime of which the defendant was convicted is strong evidence of his degenerate character seems reasonable, although it has been asserted that such crimes are mainly due to the effect of civilization. See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 256.

¹⁷ The act authorizes the sterilization of habitual criminals. WASH., REM. & BAL. CODE, § 2287. Habitual criminals include those who have been three times convicted of petit larceny. WASH. REM. & BAL. CODE, § 2286. Larceny is common among born criminals. See LOMBROSO, CRIME: ITS CAUSES AND REMEDIES, 154. Nevertheless, the fact that a man has been found guilty of three small thefts is insufficient evidence of his degeneracy. This objection is hardly lessened by the fact that the sterilization of such persons is discretionary with the court, since this discretion may be exercised arbitrarily.

¹ It is now settled that courts of equity may appoint receivers to administer the affairs of insolvent public service corporations in the absence of objection by the corporation, although it may amount to corporate dissolution without the aid of statute. *Horn v. Pere Marquette R. Co.*, 151 Fed. 626; *Re Metropolitan Railway Receiver-ship*, 208 U. S. 90, 28 Sup. Ct. 219.

² *Platt v. Philadelphia & Reading R. Co.*, 84 Fed. 535; *Dayton Hydraulic Co. v. Felsenthall*, 116 Fed. 961; *Quincy, Missouri & Pacific R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787. It is only necessary for most of the decisions, however, to hold that possession for a reasonable time by the receiver is not an adoption of the lease.

³ *Pennsylvania Steel Co. v. New York City Ry. Co.*, "The Second Avenue Bondholders' Appeal," C. C. A., Second Circ., 1912.

⁴ *Stoepel v. Union Trust Co.*, 121 Mich. 281, 80 N. W. 13; *Carswell v. Farmers' Loan & Trust Co.*, 74 Fed. 88; *St. Joseph and St. L. R. Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795. In some jurisdictions the receiver may be held for the stipulated rental during his occupancy. *Nelson v. Kalkhoff*, 60 Minn. 305, 62 N. W. 335; *Charlotte, C. & A. R. Co. v. Chester & L. N. G. R. Co.*, 118 N. C. 1078, 24 S. E. 769.

may treat the lease, after the receiver's renunciation, as surrendered from the time of the receiver's appointment.⁵ For if the term had remained vested in the lessee, the lessor could not recover from the receiver in quasi-contract, since it would have been the lessee's property that was used. Now ordinarily the appointment of a receiver does not determine the lease,⁶ nor render it liable to forfeiture without an express stipulation.⁷ The receiver may elect to adopt the lease, becoming liable as assignee,⁸ or he may reject it, when in an ordinary lease the term remains vested in the insolvent lessee.⁹ The peculiar right of the lessor to insist on forfeiture in this case must be based upon the duty owed the public that the road be operated. The lessor is not absolved from this duty by the lease.¹⁰ The receiver has refused to operate and the lessee is disabled. So public necessity demands that the lessor be allowed to take back his property.

The necessity for determining the exact status of the lease during the receiver's trial period arose in a recent case where the operation of the road was at a loss. Clearly the lessor could not recover from the receiver for the use of the road, since there is no basis in quasi-contract.¹¹ But the court went further and held that the receiver could charge the loss to the lessor. *Pennsylvania Steel Co. v. New York City Ry. Co.*, "Termination of Lease Proceeding," C. C. A., Second Circ., 1912. If the lessor demand back the road but the trial period is insisted upon, he should not be liable, since he has no control over the operation.¹² The theory of the principal case is that the lessor's failure to demand back the road amounts to consent to its operation by the receiver in his behalf. Although the disuse of the road is very detrimental to its owner, his failure to act indicates no actual consent which can be implied in fact, since after the lease the lessor is usually not in a position to assume operation of the road. And since the receivership comes about through no fault of his, he should not have the burden of acting.¹³ In several parts of the law, services rendered unofficially in expectation of charging the recipient are held entitled to compensation, on the basis of a consent implied in law.¹⁴ In the principal case there is the added reason that the lessor owes the public duty to operate the road and no one but

⁵ Since there is a provision in most leases allowing forfeiture for either insolvency or default in payment of rent, it is usually not necessary to imply this right in law.

⁶ *Chemical National Bank v. Hartford Deposit Co.*, 161 U. S. 1, 16 Sup. Ct. 439. Cf. *Rodick v. Bunker*, 84 Me. 441, 24 Atl. 897; *In re Pennewell*, 119 Fed. 139. But cf. *In re Jefferson*, 93 Fed. 948.

⁷ Cf. 1 TIFFANY, LANDLORD AND TENANT, 94.

⁸ *Spencer v. World's Columbian Exposition*, 163 Ill. 117, 45 N. E. 250.

⁹ *Chemical National Bank v. Hartford Deposit Co.*, *supra*.

¹⁰ *A. Backus, Jr., & Sons v. Detroit, W. T. & J. Ry.*, 71 Mich. 645, 40 N. W. 60; *Ryerson v. Morris Canal & Banking Co.*, 71 N. J. L. 381, 59 Atl. 29; *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 5 Sup. Ct. 578.

¹¹ *Park v. New York, L. E. & W. R. Co.*, 57 Fed. 799.

¹² If he have no right to demand back the road, the reason for absolving him is stronger.

¹³ Cf. WILLISTON, SALES, § 662.

¹⁴ KEENER, QUASI-CONTRACTS, c. vii. An analogy is found in the rule that finders are entitled to reasonable compensation. *Reeder v. Anderson's Administrators*, 4 Dana (Ky.) 193; *Chase v. Corcoran*, 106 Mass. 286. Another instance is the law of salvage. Another, the law of general average.

the receiver is in a position to fulfil that duty. But the question in the principal case is between the lessor and the lessee. The lessee also owes this public duty,¹⁵ and as the lease is necessarily made with public authority¹⁶ and the lessee assumes the obligation, his liability is primary. The receiver is appointed and operates on behalf of the lessee estate and the benefit to the lessor is incidental. Consequently, it is difficult to find a basis for the lessor's responsibility to the receiver.¹⁷

COMPARISON OF HANDWRITING. — The phrase "similitude" or "comparison of hands" was employed by the early judges to express their aversion for all handwriting testimony which involved a comparison between one piece of writing and another.¹ To the peculiar reverence manifested by later judges for this phrase must be traced the technical rules which obtained at common law wherever this sort of evidence was involved.² Where the comparison is made by the jury the lack of necessity for any such rules is clear, for the genuine writing offered in evidence³ for comparison with the disputed writing differs on principle in no respect from ordinary circumstantial evidence. Yet in England it required a statute⁴ definitely to settle the permissibility of such comparison, and in many American jurisdictions such comparison was either entirely forbidden or permitted only under various restrictions.⁵

The opinion of a witness as to the genuineness of a disputed writing in court, after comparison, should be admitted in the discretion of the court, which in all cases of opinion evidence should be extensive, if there

¹⁵ 1 ELLIOTT, RAILROADS, 2 ed., § 458.

¹⁶ *Ibid.* §§ 429, 430.

¹⁷ *Cf.* *Phinizy v. Augusta & Knoxville R. Co.*, 62 Fed. 771. See *Brown v. Toledo, P. & W. R. Co.*, 35 Fed. 444, 445. But see *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 81 Fed. 254, 258. The broad ground discussed is not necessary to the decision in the principal case since there the intervening of the lessor gave assent to the receivership, and since the deficit was not caused by simply operating the road but by payments to protect the lessor's franchises. Moreover, the question might well be different if the lessee had no assets and the creditors of the receiver during the trial period were seeking to charge the lessor for their services in enabling the discharge of his public duty.

¹ For illustrations see *Trial of Sir Richard Grahme*, 12 How. St. Tr. 646, 735; *King v. Crosby*, 12 Mod. 72.

² Testimony by witnesses directly to the act of writing the words in dispute, and direct testimony to circumstances leading up or pointing back to that act, are merely ordinary illustrations of testimony from knowledge and involve no considerations peculiar to handwriting evidence.

³ The theoretical objection to the introduction of all handwriting as a basis for comparison on the ground that, the question of genuineness being for the jury, it will tend to complicate the issues, is clearly untenable, since the genuineness of the document, like all preliminary questions of fact regarding the admissibility of evidence, should be determined as a preliminary matter by the court.

⁴ 17 & 18 VICT. c. 125, § 27. This statute has been adopted in many American jurisdictions, frequently verbatim. Scotland and Ireland were excepted from the operation of this statute; but the same law was soon extended to Ireland. 19 & 20 VICT. c. 102, § 30.

⁵ The reason for the great divergence in the American decisions is probably to be found in the fact that each jurisdiction, as it adopted a rule on the subject, tended to follow the prevailing English view, which went through several transformations. For the present state of the law in the various jurisdictions, see 3 WIGMORE, EVIDENCE, § 2016.

is present either of the reasons which usually justify the admission of opinion evidence. These are: first, the need by the jury of an expert expression of opinion because of the technicalities of the subject; or, second, the impossibility of stating the witness's information in such a way as to enable the jury to draw a reliable inference. It follows that if the witness is an expert in handwriting, although he has had no previous knowledge of the handwriting of the individual in question, his testimony should be admitted on the first ground. Yet it was many years before the admission of such testimony was completely established in England by statute.⁶ In this country, also, although to-day in most jurisdictions such testimony is admissible with or without restriction, in many cases a statute was necessary to make it so.⁷ If the witness is a non-expert who has no previous knowledge of the handwriting in question, both reasons are absent. The opinion evidence, therefore, of such a witness is justly held inadmissible.⁸ But if the witness has seen writing known to be that of the individual whose writing is in dispute, his testimony should be admissible in the court's discretion for the second reason above mentioned. On principle, a proper exercise of the court's discretion would frequently result in excluding such evidence because of the accessibility of a sufficient quantity of better evidence. From the earliest days, however, in civil cases in England such testimony was always admissible from one who had seen the party write.⁹ By the beginning of the nineteenth century, both in England and in this country it was admissible in criminal cases as well.¹⁰ By this time also opinion evidence was always permitted from one who had merely seen documents known to have been written by the person in question,¹¹ whether the source of belief consisted in an admission, express¹² or implied,¹³ or in other circumstances.¹⁴

When the document containing the disputed writing has been lost and the question is as to the admissibility of the opinion of a non-expert witness who has seen it, based on a comparison between his impression of the disputed writing and genuine writings in court, the testimony has ordinarily been excluded.¹⁵ If the witness is an expert, several juris-

⁶ 17 & 18 VICT. c. 125, § 27.

⁷ For the state of the authorities, see 3 WIGMORE, EVIDENCE, §§ 1993, 1994, 2008, 2016.

⁸ *Page v. Homans*, 14 Me. 478. See *Doe v. Suckermore*, 5 A. & E. 733, 749. There is a *dictum* opposed to this view which in terms would admit such testimony, but which, it is very probable, was not so intended. See *Vinton v. Peck*, 14 Mich. 287, 295. In Michigan and Delaware, however, a witness who has seen the party write may give an opinion from a comparison in court. *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198. This was at one time the law in England, but has long ceased to be so. *Garrells v. Alexander*, 4 Esp. 37.

⁹ *Blurton v. Toon*, Skin. 639. See *Trial of the Seven Bishops*, *supra*.

¹⁰ *De la Motte's Trial*, 21 How. St. Trials 687, 810.

¹¹ See *Lord Ferrers v. Shirley*, Fitzgibbon 195, 196; *Engleton v. Kingston*, 8 Ves. 438, 474.

¹² *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Hammond's Case*, 2 Me. 33.

¹³ See *Cunningham v. Hudson River Bank*, 21 Wend. 556, 558. For the application of the principle of implied admissions to an exchange of correspondence, see 1 WIGMORE, EVIDENCE, § 702.

¹⁴ *Commonwealth v. Webster*, 59 Mass. 295.

¹⁵ *Putnam v. Wadley*, 40 Ill. 346. Cf. *Collins v. Ball*, 82 Tex. 259, 17 S. W. 614. The decision in *Bruce v. Crews*, 39 Ga. 544, was based on the interpretation of a statute.

dictions have held the evidence admissible.¹⁶ A recent Minnesota case admits the evidence although the witness was not an expert.¹⁷ *Cochran v. Stein*, 136 N. W. 1037 (Minn.). This decision, it is submitted, takes the correct view. The witness is unable adequately to tell the jury how the lost signature looked, without expressing his opinion whether it resembles the signatures in court; and the circumstances of the case make the evidence peculiarly essential. It is not necessary to rely on the additional reason present in similar cases where the witness is an expert.

REGULATION OF RAILROAD CROSSINGS. — By virtue of the police power a state legislature enjoys a wide discretion as to the regulation of railroad crossings, which it may delegate to a commission¹ or municipal corporation.² This discretion will not be questioned unless abused.³ Thus, a railroad required to maintain a crossing⁴ or construct a viaduct over its tracks⁵ at its own expense cannot complain that its property is taken without due process of law. Where several railroads using the same tracks have agreed with each other or with the municipality as to how the expense of such improvements shall be distributed, a different apportionment does not impair the obligation of contracts⁶ or deny the equal protection of the laws.⁷

If an alteration is to be made the legislature or its delegates may dictate the plans and specifications.⁸ In a recent case an ordinance requiring a railroad to build a viaduct over its tracks of sufficient additional strength to support a street railway was held valid. *Missouri Pacific Ry. Co. v. City of Omaha*, 197 Fed. 516 (C. C. A., Eighth Circ.). The decision seems to stand for this principle: a railroad's property is not taken for private purposes, because another company which is to benefit by the improvement is not obliged to contribute, so long as the use which this incidental beneficiary makes of the highway improvement does not exceed what the particular state can authorize as a proper exer-

¹⁶ *Koons v. State*, 36 Oh. St. 195; *State v. Shinborn*, 46 N. H. 497; *contra*, *Hynes v. McDermott*, 82 N. Y. 41.

¹⁷ *Cf. Hammond v. Wolf*, 78 Ia. 232, 42 N. W. 778. This case was decided under a statute the material words of which were, "Evidence respecting handwriting may be given by comparison made by experts . . . with writings of the same person which are proved to be genuine." The reasoning of the opinion would seem to be equally convincing in the absence of a statute.

¹ *New York and New England R. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437.

² *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513; *People v. Union Pacific R. Co.*, 20 Colo. 186, 37 Pac. 610.

³ See *New York and New England R. Co. v. Bristol*, 151 U. S. 556, 570, 571, 14 Sup. Ct. 437, 441.

⁴ *Boston and Maine R. Co. v. York County Commissioners*, 79 Me. 386, 10 Atl. 113; *Chicago N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109.

⁵ *Chicago, B. & Q. R. Co. v. Nebraska*, *supra*; *New York and New England R. Co. v. Bristol*, *supra*.

⁶ *Chicago, B. & Q. R. Co. v. Nebraska*, *supra*; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 221 U. S. 400, 31 Sup. Ct. 537.

⁷ *Chicago, B. & Q. R. Co. v. Nebraska*, *supra*; *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, *supra*.

⁸ *Chicago, B. & Q. R. Co. v. Nebraska*, *supra*; *New York and New England R. Co. v. Bristol*, *supra*; *People v. Union Pacific R. Co.*, *supra*.

cise of the highway easement. The result is sound, for, since the railroad and not the highway use creates the danger, it is not unreasonable that the former rather than the latter should bear the expense of removing it.⁹

It is well settled in most states¹⁰ that a street railway is a proper use of the highway within the scope of the original taking or dedication. The abutting owners cannot recover damages for such use as excessive, nor an intersecting railroad for interference with its right of way.¹¹ Whether the motive power be horse,¹² cable,¹³ or electricity,¹⁴ is immaterial so long as the purpose is to facilitate traffic along the street. Even a subway is not an excessive use though it deprive the abutting owner of vaults below the street.¹⁵ Since the street railway enjoys special privileges, the state or city may demand in return that it build or repair the highways or viaducts it uses.¹⁶ But if the state does not choose to do so the railroad would seem to have no sounder complaint because it is obliged to make a viaduct capable of accommodating a street railway than because it must make one strong enough to carry taxicabs, omnibuses, gas pipes, sewers,¹⁷ or any other proper street uses. It is unfortunate, therefore, that several previous authorities should have rejected the doctrine of the principal case and held similar legislation unconstitutional.¹⁸

⁹ See *Boston and Maine R. Co. v. York County Commissioners*, 79 Me. 386, 396, 10 Atl. 113, 115.

¹⁰ New York seems to be the only dissenting state. *Craig v. Rochester City and Brighton R. Co.*, 39 N. Y. 404; *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213. See LEWIS, *EMINENT DOMAIN*, 3 ed., §§ 158, 161. In Pennsylvania, however, an electric railway is held an improper use of country roads, though proper in city streets. *Pennsylvania R. Co. v. Montgomery County Passenger Ry.*, 167 Pa. St. 62, 31 Atl. 468. And in Wisconsin interurban street railroads are held excessive, though intra-urban are within the proper uses of the highway. *Younkin v. Milwaukee, etc. Co.*, 120 Wis. 477, 98 N. W. 215.

¹¹ *Chicago, etc. R. Co. v. Whiting, etc. R. Co.*, 139 Ind. 297, 38 N. E. 604; *Chicago, B. & Q. R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255, 40 N. E. 1008.

¹² *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Hinchman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75.

¹³ *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. 884.

¹⁴ *Howe v. West End St. R. Co.*, 167 Mass. 46, 44 N. E. 386; *Dean v. Ann Arbor St. R. Co.*, 93 Mich. 330, 53 N. W. 396.

¹⁵ *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327. An elevated railroad, however, is usually held an excessive use. *Story v. New York Elevated R. Co.*, 90 N. Y. 122. See LEWIS, *EMINENT DOMAIN*, 3 ed., § 157. A commercial railroad is held an excessive use, also, since it does not facilitate traffic along the highway, but merely between station and station along its line. *Bond v. Pennsylvania R. Co.*, 171 Ill. 508, 49 N. E. 545; *Bork v. United N. J. R. & C. Co.*, 70 N. J. L. 268, 57 Atl. 412. See LEWIS, *EMINENT DOMAIN*, 3 ed., §§ 152-156.

¹⁶ *Cf. Jenree v. Metropolitan St. Ry. Co.*, 86 Kan. 479, 121 Pac. 510; *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Detroit, F. W. & B. I. Ry. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540.

¹⁷ These are recognized street uses. *Cone v. Hartford*, 28 Conn. 363; *Cheney v. Boston Consolidated Gas Co.*, 198 Mass. 356, 84 N. E. 492. It would seem that railroads must provide for them. *Cf. New Orleans Gas Light Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, 25 Sup. Ct. 471; *Chicago, B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 26 Sup. Ct. 341.

¹⁸ *Briden v. New York, N. H. & H. R. Co.*, 27 R. I. 569, 65 Atl. 315. *Cf. Carolina Central R. Co. v. Wilmington St. Ry. Co.*, 120 N. C. 520, 26 S. E. 913; *Conshocken R. Co. v. Pennsylvania R. Co.*, 15 Pa. Co. Ct. R. 445. It is to be noted that in the last two cases the railroad was not directly ordered by the legislature to assume the entire

THE EFFECT OF WAIVER OF TORT ON LATER ACTIONS. — The doctrine of waiver of tort, that the true owner may sometimes sue a mere converter in *indebitatus assumpsit* on a fictitious promise to pay, is firmly entrenched in our law, but its limits have never been clearly defined.¹ Perhaps a majority of American jurisdictions carry it to its logical conclusion and allow *assumpsit* for goods sold and delivered,² although there has been no subsequent sale by the tortfeasor upon which to ground the early fiction of a promise in an action for money had and received.³ Since the whole doctrine arose on considerations of convenience alone, it may be fairly carried to its full length.³

Whatever the limits of this doctrine, it is often necessary to consider the effect of the judgment in such a suit in passing title to the chattel converted. In a late English case the court refused recovery in *detinue* against a vendee of the converter, because judgment apparently in *indebitatus assumpsit* had been obtained after the sale against the converter himself.⁴ *Bradley & Cohn, Ltd., v. Ramsay & Co.*, 106 L. T. R. 771 (Eng., C. A., June, 1912). If the former action had been *trover*, it is clear that the purchaser would not be protected by the judgment against his vendor.⁵ Even in the case of joint tortfeasors where the remedy is joint and several a judgment in *trover* against one is no bar to an action against another.⁶ The difference in the form of the prior action should make no difference in the result, for the substantial right is the same in either action. It is elemental that there has been no real sale. The distinction in the principal case seems a step backward toward the antiquated emphasis on form, raising "a fiction to defeat a remedy." When the true owner has brought a previous suit in *assumpsit*, or has accepted a part of the proceeds of the sale from the converting vendor, the courts sometimes talk of ratification of the sale,⁷ but it is impossible to ratify an act which did not purport to be done in one's behalf.⁸ Furthermore, there seems no injustice in the plaintiff's demanding the proceeds of the sale, and, failing to get them, demanding at least the fair value of the

expense. As a street railroad is an additional servitude on the highway in New York, such legislation might properly be held unconstitutional in that state. Cf. *People v. Adams*, 88 Hun 122, 34 N. Y. Supp. 579, aff'd in 147 N. Y. 722, 42 N. E. 725.

¹ See 6 HARV. L. REV. 223.

² *Moore v. Richardson*, 68 N. J. L. 305, 53 Atl. 1032; *Shober & Carqueville Lithographing Co. v. Schedler*, 63 Ill. App. 48; *Crown Cycle Co. v. Brown*, 39 Or. 285, 64 Pac. 451.

³ *Moses v. Macferlan*, 2 Burr. 1005; *Lightly v. Clouston*, 1 Taunt. 112. See POLLOCK, TORTS, 9 ed., 554.

⁴ In the prior suit the action was nominally in *detinue*, but the court thought its pleadings framed on the theory of *assumpsit*. The evidence was clear that there was no prior contract, so we must either view the judgment by consent as a contract in itself, although it is difficult to work out the defendant's assent, or treat the action as *indebitatus assumpsit* and let the judgment by consent account for the recovery of £750 for chattels worth but £400.

⁵ *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760; *Singer Mfg. Co. v. Skillman*, 52 N. J. L. 263.

⁶ *Lovejoy v. Murray*, 3 Wall. (U. S.) 1. In England the right against joint tortfeasors is joint alone, and judgment against one bars a second action. *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

⁷ *Leavitt v. Fairbanks*, 92 Me. 521.

⁸ *Mitchell v. Minnesota Fire Association*, 48 Minn. 278, 51 N. W. 608; *Collins v. Suaw*, 7 Rob. (N. Y.) 623.

chattel from the subsequent converter. It is submitted that a second action should be allowed unless the present defendant can show that it is inequitable.⁹

The case of suits in *indebitatus assumpsit* and *trover* against the same defendant must be distinguished. Here judgment in one clearly and justly merges that cause of action.¹⁰ But in general the arguments above given apply with equal force to the case of a judgment in *indebitatus assumpsit* while the original tortfeasor is still in possession of the property, followed by an action of *replevin* before satisfaction.¹¹ Here it is more difficult to decide whether *replevin* is allowed even after an action of *trover*. The cases allowing *replevin*,¹² however, where the chattel at the time of the prior judgment was in the hands of a third party, do not rely on this fact, and it seems to afford no basis for a distinction.¹³ In fact there are well-considered *dicta*¹⁴ and at least two decisions that an unsatisfied judgment does not bar *replevin*.¹⁵ The contrary doctrine places far too much emphasis on the questionable vexation of a delinquent defendant, and far too little on the right of the injured plaintiff to his property or its value. It is, in effect, forcing on a plaintiff a sale of his property on credit to a debtor of doubtful solvency, when he has asked for compensation for the loss of that property.

ENFORCEMENT BY ONE STATE OF PENAL STATUTES OF ANOTHER. — The rule that penal statutes of one state will not be enforced in another is well settled, but what statutes are included under this head is a question which has divided the courts. The Supreme Court of the United States¹ and the Privy Council of England² limit the term "penal" to those statutes forbidding and punishing acts against the state. In most state courts the definition covers any statute the purpose of which is to prevent forbidden acts by inflicting penalties and punishment.³ The ques-

⁹ See *Huffman v. Hughlett*, 11 Lea (Tenn.) 549. *Contra*, *Terry v. Munger*, 121 N. Y. 161.

¹⁰ *State Bank of Council Grove v. Rude*, 23 Kan. 143.

¹¹ The same point is presented by an action of *trover*, *indebitatus assumpsit*, or *replevin* against one who purchases after a judgment in *indebitatus assumpsit* against the original tortfeasor in possession. If title passed on the prior judgment the later action would not lie.

¹² See cases cited in note 5, *supra*.

¹³ But see 16 HARV. L. REV. 131; 3 HARV. L. REV. 326. The view that judgment in *trover* against a tortfeasor in possession passes title probably developed from the early doctrine that possession of chattels gives title. See 3 HARV. L. REV. 23, 24.

¹⁴ See *Hepburn v. Sewell*, 5 Harr. & J. (Md.) 211, 212; *Drake v. Mitchell*, 3 East, 251, 258.

¹⁵ *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928; *Goff v. Craven*, 34 Hun (N. Y.) 150. *Contra*, *Rogers v. Moore*, Rice (S. C.) 60; *Foreman v. Neilson*, 2 Rich. Eq. (S. C.) 287.

¹ See *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224. This point in the Supreme Court decision is *dictum*, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution. See MINOR, CONFLICT OF LAWS, § 10, n. 3.

² See *Huntington v. Attrill*, [1893] A. C. 150.

³ *Derrickson v. Smith*, 27 N. J. L. 166; *Halsey v. McLean*, 94 Mass. 438; *Bird v. Hayden*, 1 Rob. (N. Y.) 383; *Cary v. Schmeltz*, 141 Mo. App. 570, 125 S. W. 532.

tion is not one merely of scholastic definition. It should be determined by the general principles which govern the enforcement by one sovereign of rights created by another.

By a principle of private international law common to all countries, it is customary for one nation to give effect to foreign rights founded on those broad rules of justice which are accepted by all nations.⁴ The common law has adopted this principle and has made it definite, at least to the extent that common-law rights acquired in one state must be enforced in another unless contrary to its public policy.⁵ Furthermore, many remedial rights given by statute are also enforced, which though not given by the common law are an extension of the same principles.⁶ One state, however, cannot punish as a crime an act committed in another state.⁷ It would be punishing an act over which it had no jurisdiction and in which it had no interest, contrary to that principle of the common law which limits a state's right to punish to those wrongs committed against itself or its people.⁸ A state passes also a great number of statutes to regulate its internal affairs and protect itself and its people from harm. The same principle that prevents one state from punishing crimes against another would prevent the enforcement of foreign police regulations. A penalty for a violation of such regulations is no less a punishment of the defendant when the fine instead of going to the state is given to one of the other parties interested in the suit. When the money exacted from the defendant is not recompense for damage he has caused, it must have been exacted as a punishment and a preventative for the future.

In a recent case a statute made directors responsible for the full liabilities of the corporation unless they filed with the secretary of state a report showing its financial condition and other matters. It was held in accordance with the Supreme Court definition that this statute was not penal and was therefore enforceable in another state. *The Great Western Machine Co. v. Smith*, 124 Pac. 414 (Kan.). This statute places on the directors a heavy burden which cannot be compensation for damage they have caused, because many of the contracts may have been made before the time for filing the report. The creditor is given a right he did not expect or bargain for in addition to his just common-law right. Clearly on the reasoning followed above, the operation of such a statute should be confined to the state where it is enacted.

It may be argued that when the state allows a private person to exact punishment it confers on him part of its right to punish, and that this right being personal should be transitory and enforceable anywhere. But a state cannot punish acts outside of its own jurisdiction, and it is most unlikely that the statute was intended to give such persons a broader right than the state itself has. The individual's right is subsidiary to the state's. The state confers the right on the individual merely as one method of enforcing its police power and intends that right

⁴ See MINOR, CONFLICT OF LAWS, § 4.

⁵ See 1 WHARTON, CONFLICT OF LAWS, 3 ed., §§ 14, 1a.

⁶ *Dennich v. Railroad Co.*, 103 U. S. 11.

⁷ *State v. Knight*, 2 Hayw. (N. C.) 109.

⁸ See MINOR, CONFLICT OF LAWS, § 203.

to be exercised through its own courts. Neither the common law, nor general principles of justice, give a private person the right to punish except in certain limited cases, such as that of parent and child, or school-master and pupil; so the right, when given, should be strictly construed and limited closely to the purpose intended by the statute. It is submitted, therefore, that any statute imposing upon a defendant a penalty which is not recompense for damage he has caused is a penal statute not properly enforceable in a foreign state.⁹

RECENT CASES.

AGENCY — AGENT'S LIABILITY TO THIRD PARTIES — WHETHER LIABLE FOR NONFEASANCE. — The defendant, an agent of a telephone company, was charged with the duty of inspecting and repairing its poles. As a result of his negligence in discharging these duties a pole fell and injured the plaintiff. *Held*, that the plaintiff may recover. *Murray v. Cowherd*, 148 Ky. 591, 147 S. W. 6.

The court refuses to follow the usual distinction between misfeasance and nonfeasance, and maintains that in each case the agent is guilty of a breach of duty to a third person. There is a principle in criminal law that the failure to perform a legal duty, such as that of an agent to his master, has the legal effect of an act, and if injury results therefrom the agent may be liable. *Regina v. Lowe*, 3 C. & K. 123. There, however, the question is merely one of punishing a wrongful act causing an injury. In torts a duty to the plaintiff is also necessary. It is a well-settled rule that there is no duty to act affirmatively unless the parties are in some peculiar relationship. See *Sweeney v. Old Colony, etc. R. Co.*, 10 Allen (Mass.) 368. A man need only be careful that the forces he sets in motion do not injure anyone. *Delaney v. Rochereau*, 34 La. Ann. 1123. The Kentucky court seems to regard the breach of any duty as equivalent to a breach of duty to the plaintiff. See *Drake v. Hagan*, 108 Tenn. 265, 67 S. W. 470. If this doctrine is carried to its logical conclusion a failure to perform any contract might subject a man to a multitude of tort actions.

BANKRUPTCY — DISCHARGE — EFFECT ON ASSIGNMENT OF EXPECTANCY. — An heir apparent assigned his bare expectancy as security for a loan. Later he was discharged in bankruptcy. Thereafter, upon the death of his ancestor, he succeeded to a share of her estate. *Held*, that equity will enforce the assignment. *Bridge v. Kedon*, 126 Pac. 149 (Cal.).

At common law an expectation of acquiring property was not recognized as a subject of transfer. *Lunn v. Thornton*, 1 C. B. 379; *Wheeler's Executors v. Wheeler*, 2 Metc. (Ky.) 474. But see *Buddle v. Green*, 27 L. J. Ex. 33, 34; *Jones v. Webster*, 48 Ala. 109, 112. Equity, however, will enforce the assignment of an heir's expectancy when fair to do so. *Hobson v. Trevor*, 2 P. Wms. 191; *Clendening v. Wyatt*, 54 Kan. 523. *Contra*, *McCall v. Hampton*, 98 Ky. 166. On one view, it operates as a present equitable transfer of the expectancy. See 3 POMEROY, EQUITY JURISPRUDENCE, §§ 1271, 1288. By the better view, equity simply enforces a contractual duty to convey the property providing it is acquired. *Carleton v. Leighton*, 3 Meriv. 667. See *Taylor v. Swafford*, 122 Tenn. 303, 307-312, 123 S. W. 350, 351-352. Clearly the substantial

⁹ See MINOR, CONFLICT OF LAWS, § 10, pp. 23, 24. Cf. *Pickering v. Fisk*, 6 Vt. 102; *Blaine v. Curtis*, 59 Vt. 120, 7 Atl. 708; *Indiana v. John*, 5 Ham. (Ohio) 217.

elements of a contract are necessary. *Estate of Lennig*, 182 Pa. 485, 38 Atl. 466. Since equitable jurisdiction over contracts is concurrent, it seems desirable to follow legal analogy instead of creating a new property interest in order to make possible a present equitable transfer. Indeed, it is well established that an expectancy does not pass to a bankrupt's trustee. *Moth v. Frome*, 1 Ambl. 394; *In re Inkson's Trusts*, 21 Beav. 310. By a third view, the assignment may be treated as a grant of power to receive the after-acquired property. See WILLISTON, SALES, § 132. Such power would survive the discharge in bankruptcy. *Hayes v. Pike*, 17 N. H. 564; *Siedman v. Gassett*, 18 Vt. 346. In the principal case the court adopted the first theory. The right of the assignee of the expectancy after the assignor's bankruptcy would also be protected even though the assignment is regarded as merely an executory contract. For a discharge in bankruptcy does not extinguish a debt. *Fletcher v. Neally*, 20 N. H. 464; *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498. Consequently it does not prevent the enforcement of a security. *Moody v. Webster*, 20 Mass. 424; *Paxton v. Scott*, 66 Neb. 385, 92 N. W. 611. Likewise it should not impair an agreement for security, which is otherwise valid and not dischargeable in itself. *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564; *Citizens' Loan Association v. Boston & Maine R. Co.*, 196 Mass. 528, 82 N. E. 696. *Contra*, *In re West*, 128 Fed. 205; *In re Home Discount Company*, 147 Fed. 538. Apart from the debt, the contract liability, being subject to a condition precedent, was not even provable. BANKRUPTCY ACT OF 1898, § 63; *In re Ellis*, 143 Fed. 103. Only provable claims are discharged. BANKRUPTCY ACT OF 1898, § 17. Furthermore, it is not the policy of the Bankruptcy Act to affect a specific duty of the debtor, particularly when that duty serves as a security. See BANKRUPTCY ACT OF 1898, §§ 17, 63, 67 d.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN PENAL LAWS. — A statute in Colorado provided that the directors of a corporation should be liable for the debts of the corporation, if they failed to file a report of its condition. *Held*, that the liability created by the statute will be enforced in Kansas. *The Great Western Machine Co. v. Smith*, 124 Pac. 414 (Kan.). See NOTES, p. 172.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — CRUEL PUNISHMENT. — A Washington statute provided that in cases of conviction for statutory rape and certain other crimes the court might direct that an operation be performed for the prevention of procreation. In pursuance of this provision the trial judge ordered that the operation known as vasectomy be performed on the defendant. The state constitution forbade the infliction of cruel punishments. *Held*, that the operation is not a cruel punishment. *State v. Feilen*, 126 Pac. 75 (Wash.). See NOTES, p. 163.

CORPORATIONS — TORTS — LIABILITY FOR AGENT'S SLANDER. — A department manager acting in the course and scope of his employment publicly accused an employee of stealing. No specific authorization or ratification was shown. *Held*, that the corporation is not liable. *Steward Dry Goods Co. v. Heuchiker*, 146 S. W. 423 (Ky.).

Salesmen of the defendant corporation acting in the course and scope of their employment injured the plaintiff's business by stating that his oil would not meet statutory tests, and that he and his customers could be indicted for selling it. There was no specific authorization or ratification. *Held*, that the corporation is liable. *Waters-Pierce Oil Co. v. Bridwell*, 147 S. W. 64 (Ark.).

Early decisions held that a corporation was not liable for its agents' libel or slander. *Childs v. Bank of Missouri*, 17 Mo. 213. But these decisions

are now discredited. *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986; *Hypes v. Southern Ry. Co.*, 82 S. C. 315, 64 S. E. 395. The principal cases merely differ as to the circumstances under which a corporation incurs liability for slander. By general principles a corporation should be liable for an agent's acts in the course and scope of the employment. *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 3 S. E. 923. See *Goodspeed v. East Haddam Bank*, 22 Conn. 539, 538. This is the basis of liability in deceit and libel. *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423. Yet most courts require slander to be authorized or ratified, arguing that slander is an act of personal malice, for which usually the speaker alone should be liable. *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392; *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 43 So. 210. But slander does not seem to differ so materially from libel as to require a different rule. *Rivers v. Yazoo & Mississippi R. Co.*, 90 Miss. 196, 43 So. 471. Moreover, the malicious and wilful nature of an act should on principle be quite immaterial, unless malice proves to be the agent's sole motive to the exclusion of any intention to act for the master in the course of the employment. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Howe v. Newmarch*, 94 Mass. 49. Recent decisions tend to fix the corporation's liability by the more logical rule of the Arkansas case. *Stewart v. New South Wales Country Press Co.*, 12 N. S. Wales, 171; *Hypes v. Southern Ry. Co.*, *supra*. A similar tendency is noticeable in actions against a corporation for malicious prosecution. *Fetty v. Huntington Loan Co.*, 74 S. E. 956 (W. Va.).

COVENANTS OF TITLE — COVENANT AGAINST INCUMBRANCES — WHETHER CAUSE OF ACTION CONCLUDED BY FORMER RECOVERY. — The plaintiff, after paying off incumbrances on property conveyed, sued for breach of a covenant against incumbrances. The defendant set up a former recovery of nominal damages before the incumbrance had been paid off. *Held*, that such former recovery is no bar to the present action. *Harsin v. Oman*, 123 Pac. 1 (Wash.).

A second recovery on the same facts depends on the accrual of a subsequent obligation which could not have been litigated in the previous suit. *McEvoy v. Bock*, 37 Minn. 402, 34 N. W. 740. See BLACK, JUDGMENTS, 2 ed., 747. The decision in the principal case is thus indisputable if the agreement is construed as a continuing covenant to indemnify. *Beach v. Crain*, 2 N. Y. 86; *Orendorff v. Utz*, 48 Md. 298. The measure of damages suggests a similarity to indemnity agreements, for the amount recoverable is assessed in proportion to the actual expense incurred by the obligee in paying off the incumbrance, and material damages are not allowed where no loss has yet resulted. *Eaton v. Lyman*, 30 Wis. 41. This rule, however, is merely to preclude double liability in case of action by the holder of the incumbrance claim against the original covenantor. *Delavergne v. Norris*, 7 Johns. (N. Y.) 358. If the covenant is regarded as an agreement to indemnify, no right of action can vest until the covenantee has suffered damage. *Abeles v. Cohen*, 8 Kan. 180. In approving the previous allowing of nominal damages, therefore, the principal case treats the covenant as broken when made. To allow a subsequent recovery, as if on a continuing promise to indemnify, seems clearly inconsistent. *Taylor v. Heitz*, 87 Mo. 660.

DEEDS — CONDITIONS — ASSIGNMENT OF RIGHT OF ENTRY TO CO-HEIR. — Land was deeded to the defendant on condition that if it were used for other than church purposes it should revert. After breach of the condition three of the heirs of the grantor assigned their rights of entry to their co-heir, who sued for the entire property. *Held*, that he may recover. *Southwick v. New York Christian Missionary Society*, 151 N. Y. App. Div. 116, 135 N. Y. Supp. 392.

At common law a right of entry was not assignable, the reasons being that

such assignment constituted maintenance and that the right was a strictly personal one under the feudal system. See COKE ON LITTLETON, §§ 347, 325 n. 1. An attempted assignment destroyed the right. *Rice v. Boston & Worcester R. Co.*, 12 Allen (Mass.) 141. But by statute in England and in many states the right is assignable with the reversion after estates for life or for years. *Scallock v. Harston*, 1 C. P. D. 106. See 1 STIMSON, AMERICAN STATUTE LAW, § 1352. And in England and a few states the possibility of reverter after a fee is devisable or assignable, though in some statutes a distinction is made between assignability before and after breach. *Pemberton v. Barnes*, [1899] 1 Ch. 544; *Yazoo & M. V. R. Co. v. Lakeview Traction Co.*, 100 Miss. 281, 56 So. 393; CONN., GEN. STAT., 1902, § 4051; CAL., CIV. CODE, §§ 1046, 1047. New York, however, holds strictly to the non-assignability of the right of entry after a fee, whether before or after breach. *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 121; *Fowler v. Coates*, 201 N. Y. 257, 94 N. E. 997. See *Van Rensselaer v. Ball*, 19 N. Y. 100, 103-105. Nevertheless the majority of the court in the principal case hold that the assignment to the co-heir is valid. Although there seems to be no direct authority on this point, the distinction, it is submitted, is correct. The assignment, being to a person already having the right, is in no sense maintenance. Cf. *Russell v. Doyle*, 84 Ky. 386; *Dorwin v. Smith*, 35 Vt. 69. The common-law reason as to personal representation is also satisfied. And as a right of entry is inherently indivisible the plaintiff is clearly entitled to enforce the right as to the whole of the property. *Bowier v. Baltimore & New York R. Co.*, 67 N. J. L. 281, 51 Atl. 781. But cf. *Cruger v. McLaury*, 41 N. Y. 219.

EMINENT DOMAIN—WHAT PROPERTY MAY BE TAKEN—PROPERTY TAKEN OF WHICH CITY WAS GRANTOR. — A city vacated and conveyed to a railway company the fee in certain street crossings. Subsequently the city began condemnation proceedings to reobtain the crossings in order to reopen the streets. Held, that the railway company has no right to an injunction. *City of Osceola v. Chicago, Burlington & Quincy R. Co.*, 196 Fed. 777.

The power of eminent domain is a power inherent in sovereignty. *Brown v. Beatty*, 34 Miss. 227. See *Pollard v. Hagan*, 3 How. (U. S.) 212, 223. This power is vested in the legislature as the representative of the people in their sovereign capacity. *Kennebec Water District v. City of Waterville*, 96 Me. 234, 52 Atl. 774. The power of taking property by eminent domain for street or other public purposes may be delegated by the legislature to a municipality. See *Maryland ex rel. McClellan v. Graves*, 19 Md. 351, 369. Although the right of eminent domain has been vested by the people in the legislature, the power to contract away that right is not given. *Lock Haven Bridge Co. v. Clinton County*, 157 Pa. St. 379, 27 Atl. 726; *Matter of Opening of First Street*, 66 Mich. 42, 33 N. W. 15. To hold otherwise might allow the state in time to be precluded from the exercise of its ordinary and essential functions. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 754. If a legislature or municipality having the power of eminent domain cannot expressly contract it away by special agreement, *a fortiori* the mere fact that a municipality is the grantor of the lands does not preclude it from exercising the power.

EQUITABLE ELECTION — WHETHER ONE MAY TAKE UNDER WILL IN ONE STATE AND AGAINST IT IN ANOTHER. — A married woman, owning lands in Illinois and Kansas, devised all of her property to her husband for life, with limitations over. He elected to take under the will in Illinois with full knowledge of his rights in that state, and enjoyed the lands until his death. It did not appear that he knew of his rights under the laws of Kansas. After his death, his son, as heir, claimed half of the Kansas land in fee on the theory that his father had not made a binding election in Kansas and therefore took under

the law in that state. *Held*, the son cannot succeed. *Martin v. Batley*, 125 Pac. 88 (Kan.).

It is well settled that a person cannot take a benefit under a will and at the same time assert a right that will defeat its full effect and operation. *Cooper v. Cooper*, L. R. 7 H. L. 53; *Crawford v. Bloss' Estate*, 114 Mich. 204, 72 N. W. 148. And even though a person acts in ignorance of a material fact, he cannot later assert a title against the will unless he makes restitution. *Farmington Savings Bank v. Curran*, 72 Conn. 342, 44 Atl. 473; *Watson v. Watson*, 128 Mass. 152. The same equitable principle which requires an election also denies the power to divide the will in making the election. *Crawford v. Bloss' Estate*, *supra*; *Powell's Estate*, 225 Pa. 518, 74 Atl. 421. Clearly, therefore, in the principal case the husband could not take under the will in Illinois and against it in Kansas. And since he had enjoyed all of the property for life, his son was incapable of adequately restoring the benefits received under the will. Consequently, the son could not fairly raise the question as to a valid election in Kansas. *Cf. Hawkins v. Bohling*, 168 Ill. 214, 48 N. E. 94.

EVIDENCE — OPINION EVIDENCE — COMPARISON BY NON-EXPERT OF LOST DISPUTED WRITINGS WITH GENUINE WRITINGS IN COURT. — On an issue as to the genuineness of a writing which had been lost the testimony was offered of a witness who had seen the lost writing and had compared his impression of it with admittedly genuine specimens introduced in evidence for the purpose of comparison. *Held*, that the evidence is admissible. *Cochran v. Stein*, 136 N. W. 1037 (Minn.). See NOTES, p. 167.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — OUSTING COURTS OF JURISDICTION: AGREEMENT TO SUBMIT TO TRIBUNALS OF MUTUAL BENEFIT SOCIETY. — The plaintiff's husband died during proceedings for a mandamus to reinstate him to membership in a mutual benefit society, from which he had been expelled by a tribunal of the society composed of interested parties. The plaintiff sued as beneficiary. *Held*, that the plaintiff may recover. *Wilcox v. Supreme Council Royal Arcanum*, 151 N. Y. App. Div. 297, 136 N. Y. Supp. 377.

The decisions of the tribunals of mutual benefit societies are treated as quasi-judicial, so long as the proceedings are according to the rules of the society and not illegal otherwise. *Kelly v. Grand Circle Women of Woodcraft*, 40 Wash. 691, 82 Pac. 1007. All appeals required by the society must be taken before coming to court. *Supreme Council Order of Chosen Friends v. Forsinger*, 125 Ind. 52, 25 N. E. 129. The decisions of these bodies are subject to collateral attack only when void. *Black & White Smiths' Society v. Vandyke*, 2 Whart. (Pa.) 309. See *Croak v. High Court Independent Order of Foresters*, 162 Ill. 298, 44 N. E. 525. In the principal case the judgment is void because the tribunal was composed of interested parties. *Gay v. Minot*, 3 Cush. (Mass.) 352; *Templeton v. Giddings*, 12 S. W. (Tex.) 851. But see *Findley v. Smith*, 42 W. Va. 299, 305, 26 S. E. 370, 372. Even where the by-laws expressly provide against resort to the courts, such resort may nevertheless be had, and, when proper, by collateral attack. *Pepin v. Société St. Jean Baptiste*, 23 R. I. 81, 49 Atl. 387; *Whitney v. National Masonic Accident Association*, 52 Minn. 378, 54 N. W. 184. *Contra, Van Poucke v. Netherland St. Vincent de Paul Society*, 63 Mich. 378, 29 N. W. 863. The common law in general considers contracts which bind parties to submit finally to the decision of any tribunal other than the courts, illegal as against public policy, because the jurisdiction of the courts must not be usurped. *Baltimore & Ohio R. Co. v. Stankard*, 56 Oh. St. 224, 46 N. E. 577. *A fortiori* resort may be had where there is no express provision against it. *Supreme Lodge Order of Select Friends v. Raymond*, 57 Kan. 647, 47 Pac. 533.

INJUNCTIONS — ACTS RESTRAINED — INTERFERENCE WITH ABUTTER'S RIGHT OF FREE ACCESS. — Speakers of the Socialist party gathered crowds continuously before the plaintiffs' factory, vilified the owners and urged the workers to strike and join the Socialist party. To a bill for an injunction *pendente lite*, a general permit from the mayor was pleaded. *Held*, that the injunction should be granted. *American Mfg. Co. v. Lindgren*, 48 N. Y. L. J. 19 (Sup. Ct., Sept., 1912).

It is a general rule that a temporary injunction will be granted if the plaintiff shows a probable right, and a threatened injury to that right which if not enjoined will cause damage difficult to remedy, and if such damage is greater than the injury the injunction will cause to the defendant. *Colorado Eastern R. Co. v. Chicago, B. & Q. Ry. Co.*, 141 Fed. 898; *Charles v. City of Marion*, 98 Fed. 166. The right of an abutting owner to free access to his premises is well recognized. *West v. Brown*, 114 Ala. 118, 21 So. 452; *Jaques v. National Exhibit Co.*, 15 Abb. N. Cas. (N. Y.) 250. The injury threatened, if continued, would be one difficult to remedy. *Elias v. Sutherland*, 18 Abb. N. Cas. (N. Y.) 126. To require a temporary cessation of the meetings in the principal case would cause the defendants little hardship and would be of great benefit to the plaintiff. The interference with the plaintiffs' right of access is, moreover, such special damage as will give them a right to a permanent injunction, the municipal permit not justifying such interference. *Branahan v. Hotel Co.*, 39 Oh. St. 333; *McCaffrey v. Smith*, 41 Hun (N. Y.) 117. Furthermore, as the plaintiffs owned the fee in the street, the defendants could be considered as trespassers, since their acts were beyond the reasonable user permitted the public. *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142; *Adams v. Rivers*, 11 Barb. (N. Y.) 390. The repeated trespasses could then be enjoined. *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935; *Owens v. Crossett*, 105 Ill. 354. On either ground a permanent injunction could be granted, and *a fortiori* an injunction *pendente lite* is proper.

INJUNCTIONS — ACTS RESTRAINED — SHERMAN ANTI-TRUST ACT: RIGHT OF PRIVATE PARTY TO SUE. — Minority stockholders of a railroad company moved for a temporary injunction to restrain a competing railroad company from purchasing a majority of the stock of the former road in violation of the Sherman Anti-Trust Act. *Held*, that the injunction should be granted. *Delavan v. New York, New Haven, and Hartford R. Co.*, 137 N. Y. Supp. 207 (Sup. Ct.).

The only party expressly authorized to maintain a bill in equity for injunctive relief for a violation of the provisions of the Sherman Act is the United States by its district attorney, under the direction of the Attorney General. 3 U. S. COMP. STAT., 1901, p. 3201, § 4. Private redress for injury due to its violation is allowed by an action at law for damages. 3 U. S. COMP. STAT., 1901, p. 3202, § 7. Moreover, the statute is penal in its nature. 3 U. S. COMP. STAT., 1901, pp. 3200 *et seq.*, §§ 1-3, 7. Therefore it would seem that by a proper construction a private party cannot institute direct proceedings in equity to enforce its terms. Where the injury is indirect this is well settled. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598. By the weight of authority the same rule applies where the injury is direct. *Pidcock v. Harrington*, 64 Fed. 821; *Blindell v. Hagan*, 54 Fed. 40. *Contra*, *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869. But it is not believed that the Sherman Act intended to limit the common law, and if the acts complained of give sufficient basis for an injunction to issue aside from the Sherman Act, it should not be construed as abrogating that right. The decision of the principal case is correct on this view, for the purchase of the majority stock for the purpose of controlling the company and preventing competition is ground for equitable relief to the minority stockholders, independent of statute. *Dunbar v. American Tel. & Tel. Co.*, 224 Ill. 9, 79 N. E. 423. See, 20 HARV. L. R. EV. 495.

INSURANCE — MUTUAL BENEFIT INSURANCE — RIGHT TO VARY BENEFITS BY AMENDING BY-LAWS. — The defendant, a mutual benefit insurance corporation of which the plaintiff was a member, amended its by-laws so as to reduce the amount of sick benefits to which he was entitled, but not so low as the amount due under the by-laws as they existed when he became a member. He had agreed to be "guided" by the by-laws then in existence or thereafter adopted. *Held*, that the amendment was binding upon the plaintiff. *Hannes v. Nederland Israelitish Sick Fund*, 136 N. Y. Supp. 742 (Sup. Ct., App. Div.).

How far mutual benefit societies can affect the rights of members by amending the by-laws, even when the right to amend is expressly reserved, is in dispute on the authorities. There is a square conflict as to introducing a prohibition against engaging in certain businesses, as selling liquor. *Loeffler v. Modern Woodmen of America*, 100 Wis. 79, 75 N. W. 1012; *Ayers v. Grand Lodge Ancient Order of United Workmen*, 188 N. Y. 280, 80 N. E. 1020. The same is true of amendments avoiding liability in case of self-destruction. *Hughes v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 98 Wis. 292, 73 N. W. 1015. *Cf. Weber v. Supreme Tent Knights of Maccabees*, 172 N. Y. 490, 65 N. E. 258. The manner of determining beneficiaries may be varied. *Masonic Mutual Benefit Association v. Severson*, 71 Conn. 719, 43 Atl. 192. But by the weight of authority the amount of assessments cannot be increased. *Strauss v. Mutual Reserve Fund Life Association*, 128 N. C. 465, 39 S. E. 55; *Wright v. Knights of Maccabees*, 196 N. Y. 391, 89 N. E. 1078. *Contra, Fullenwider v. Supreme Council Royal League*, 180 Ill. 621, 54 N. E. 485. Great diversity exists as to the right to diminish benefits. Formerly the right was commonly admitted. *Stohr v. San Francisco Musical Fund Society*, 82 Cal. 557, 22 Pac. 1125; *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362. But the present tendency is to deny it on the ground that it was not contemplated by the parties. *Knights Templars' and Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638; *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33. From the nature of such societies, assessments and benefits must vary together in the long run. Therefore, if the benefits can be varied at all, it seems as likely that a member contemplates a reasonable decrease in both as an increase. *A fortiori*, a decrease which does not go below the original amount would be within a reasonable contemplation. It is perhaps more nearly the member's real intention that neither benefits nor assessments are to be altered. See 17 HARV. L. REV. 127.

LANDLORD AND TENANT — MONTHLY TENANCY — NOTICE NECESSARY TO TERMINATE. — A tenant from month to month gave notice of his intention to quit, and vacated the premises two weeks before the end of the month. The landlord claimed another month's rent on the ground that he was entitled to a month's notice. *Held*, that reasonable notice only is necessary. *Burgoyne v. Mallett*, 21 West. L. R. 566 (British Columbia).

It was decided by early English cases that notice commensurate with the term is sufficient to terminate a tenancy from month to month or from week to week. *Doe d. Parry v. Hazell*, 1 Esp. 94. See *Doe d. Peacock v. Raffan*, 6 Esp. 4, 5. But whether such notice is necessary seems never to have been decided in England. The court in the principal case relies on the *dicta* of two judges, which hardly support the conclusion drawn from them. See *Jones v. Mills*, 10 C. B. N. s. 788, 798, 800. The Irish courts have decided that the term for which a person takes premises is his own agreed measure of reasonableness, and that therefore that much notice is necessary to terminate the tenancy. *Beamish v. Cox*, 16 L. R. Ir. 270; *Harvey v. Copeland*, 30 L. R. Ir. 412. In the absence of express agreement, the general rule in the United States is that notice commensurate with the term is necessary. *Prickett v. Ritter*, 16 Ill. 96; *Stewart v. Murrell*, 65 Ark. 471, 47 S. W. 130. The New York cases are in some con-

fusion but purport to follow the general rule. *Anderson v. Prindle*, 23 Wend. (N. Y.) 616; *Ludington v. Garlock*, 9 N. Y. Supp. 24, 29 N. Y. St. 600. In several states the necessary notice to terminate a tenancy from month to month is fixed by statute. MO., REV. STAT., 1909, § 7883; NEW JERSEY, ACTS OF 1903, c. 13, § 3. Since a week or month respectively is in most cases a reasonable notice, and since certainty is always desirable, the rule of the American cases seems sound.

LANDLORD AND TENANT — SUBLETTING FOR ILLEGAL PURPOSES — RIGHT TO RECOVER RENT. — A lessor leased premises knowing that the lessee intended to sublet them for the purpose of running a bawdy house, but there was no evidence that the lessor intended the premises to be so used. *Held*, that the lessor may recover rent. *Ashford v. Mace*, 146 S. W. 474 (Ark.).

Illegal use of premises may render a lease void on the ground of public policy, where a lessor has linked himself with the illegal purposes of the lessee. *Ralston v. Boady*, 20 Ga. 449; *Berni v. Boyer*, 90 Minn. 469, 97 N. W. 121. Thus a lessor knowing of and intending the illegal use cannot recover rent. *Ralston v. Boady*, *supra*. But a lessor ignorant of the illegal use can clearly recover. *Commagere v. Brown*, 27 La. Ann. 314; *Zink v. Grant*, 25 Oh. St. 352. Where the lessor has knowledge of but does not intend the illegality, some courts deny him recovery. *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S. W. 272. *Cf. Smith v. White*, L. R. 1 Eq. 626. But the contrary view, expressed in the principal case, is often taken. *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Updike v. Campbell*, 4 E. D. Smith (N. Y.) 570. Consistently with this view, most courts hold that a vendor knowing of but not intending the illegal use of goods sold can recover the purchase price. *Hill v. Spear*, 50 N. H. 253; *Graves v. Johnson*, 179 Mass. 53, 60 N. E. 383. But see *Tracy v. Talmage*, 14 N. Y. 162, 215. The true basis for these decisions seems to be that a lessor or vendor who encourages and inspires the illegal act becomes a party to it; but mere knowledge of probable illegal acts by another does not in any way influence their commission. It is reasonable, therefore, that it should not prevent a recovery for the use of the property.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — WORDS CHARGING FAILURE TO PAY DEBT. — The selling agent of the defendant company wrote to the general officers of a corporation alleging that the plaintiff, who was the local manager of the corporation, was indebted to the defendant for the price of a sewing machine purchased by the manager's wife, and that despite his repeated promises he had failed to pay the debt. The allegation was false. The plaintiff brought suit for libel. *Held*, that a demurrer should be sustained on the ground that the words were not libelous. *Stannard v. Wilcox & Gibbs Sewing Machine Co.*, 84 Atl. 335 (Md.).

This decision is placed on the ground that the words used do not touch or concern the plaintiff in his business. But written words never depend for their actionable quality upon the fact that they refer to the plaintiff in his business capacity. *Sanderson v. Coldwell*, 45 N. Y. 398. See *McDermott v. Union Credit Co.*, 76 Minn. 84, 78 N. W. 967, 79 N. W. 673. The explanation of this distinction between oral and written defamation is more historical than theoretical. See *Thorley v. Lord Kerry*, 4 Taunt. 355, 364. But see *Dauncey v. Holloway*, [1901] 2 K. B. 441, 448. Written defamation has always been cognizable only in the common-law courts; but in the early law oral defamation was within the purview of the ecclesiastical courts. See STATUTE OF CIRCUMSPECTE AGATIS, 13 EDW. I. Nor originally was there any doctrine making oral wordsless actionable than written. See STARKIE, LAW OF SLANDER AND LIBEL, 6. Jealous of the ecclesiastical court's authority, the common-law judges extended their jurisdiction from time to time by devising exceptional classifications of

oral defamation which should be suable only in their courts. After the abolition of the ecclesiastical courts only the oral words which fell within these exceptional classes were actionable. See BOWER, CODE OF ACTIONABLE DEFAMATION, App. V, § 4; TOWNSEND, SLANDER AND LIBEL, 4 ed., § 56. Slanders concerning one's trade or business make up one of the classifications so devised. See *Lumby v. Allday*, 1 Cramp. & Jer. 301. In the principal case as the words were written and not oral, their actionability must depend solely upon whether they produce appreciable injury to the reputation of the plaintiff. *Cramer v. Riggs*, 17 Wend. (N. Y.) 209. See ODGERS, LIBEL AND SLANDER, 5 ed., 1. The words used in the principal case seem at least susceptible of defamatory construction. Cf. *White v. Parks*, 93 Ga. 633, 20 S. E. 78; *Muetze v. Tuleur*, 77 Wis. 236, 46 N. W. 123; *Sanders v. Edmondson*, 56 S. W. 611 (Tex. Civ. App.). Hence the court should allow the jury to determine what interpretation is correct. *Sturt v. Blagg*, 10 Q. B. 906; *Hamilton v. Lowery*, 33 Ind. App. 184, 71 N. E. 54.

LIMITATION OF ACTIONS — WAIVER OF STATUTE — WORDS NECESSARY. — In an action to recover on an obligation the defendant pleaded the statute of limitations. The plaintiff set up a written waiver made after the statutory period had run, referring to the "alleged claim," and waiving "all rights of defense . . . by reason of the statute of limitations." Held, that the waiver is not binding on the defendant. *Small v. Jones*, 75 S. E. 605 (Ga.).

The principal case conforms to the majority rule that a waiver to be operative must clearly imply a new promise to pay the barred debt. *Martin v. Broach*, 6 Ga. 21; *Stockett v. Sasscer*, 8 Md. 374. The statutory defense was originally explained on the presumption of payment rebuttable by any acknowledgment of indebtedness. *Dowthwaite v. Tibbut*, 5 M. & S. 75. One modern explanation conceives of a new binding promise supported by the moral obligation raised by the past debt. *Pittman v. Elder*, 76 Ga. 371. But this view is at variance with the present attitude of the courts toward executed consideration. *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259. Moreover, if this explanation were correct, moral consideration would apply no less to a promise to waive the statutory defense. But such is not the law. *Stockett v. Sasscer*, *supra*. The only explanation logically tenable is that the statutory bar is a personal defense, allowed by the rules of procedure, which, under certain conditions, the party will be deemed to have irrevocably waived. The arbitrary rule requiring a promise to pay seems referable to the existence of the doctrine of adequate moral consideration at the time when the statute was regarded as destroying, not the remedy, but the actual debt.

PAROL EVIDENCE RULE — SUBSTANTIVE LAW EXPRESSED IN TERMS OF EVIDENCE — DEED: PAROL AGREEMENT THAT IT IS TO TAKE EFFECT ON CONDITION. — In an action by a lessee for the breach of the lease, the lessor sought to prove an oral agreement that the lease had been delivered conditionally. Held, that the evidence was properly excluded. *American Bill Posting Co. v. Geiger*, 137 N. Y. Supp. 148.

For more than half a century it has been settled that parol evidence could be brought in to show that a written contract was in fact subject to an oral condition precedent. *Pym v. Campbell*, 6 E. & B. 370; *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239. This is allowed, not to vary the terms of the writing, but to show that no contract ever existed. When carried to its full extent, this doctrine abolishes the rule of substantive law, masquerading as a rule of evidence, that a deed cannot be delivered in escrow to the grantee. This rule, although said by text-books to be the law in England, is not fully supported by the authorities there. See NORTON, DEEDS, 16 *et seq.*; PHIPSON, EVIDENCE, 552. In this country, however, a deed cannot be delivered

in escrow to the grantee. *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Larsh v. Boyle*, 36 Colo. 18, 86 Pac. 1000. The doctrine is chiefly sustained by its age, and is difficult to defend on principle. WIGMORE, EVIDENCE, § 2408. If limited to deeds conveying realty, a possible reason might be found in the fact that such a deed is an operative instrument, which, when properly executed, is the formal act that transfers the legal title, whereas most other instruments merely evidence the creation by consent of legal relations between the parties. It is reasonable to rely on such a distinction because of the interest of society in the stability of operative instruments. See *Stiebel v. Grosberg*, 202 N. Y. 266, 271, 95 N. E. 692, 694.

PUBLIC SERVICE COMPANIES — WATER COMPANIES — DUTY TO INCREASE FACILITIES. — The defendant was supplying the city of Birmingham with water under a thirty-year franchise. Upon a bill filed to compel the defendant to supply water at sufficient pressure to a newly developed section, which necessitated larger facilities than the charter required, a decree was issued, although it appeared that such service would be unprofitable. *Held*, that such a decree is correct. *Birmingham Waterworks Co. v. City of Birmingham*, 58 So. 204 (Ala.).

While the regulation of public water companies has never gone so far as in the present case, the decision seems within the principles of public service law. The service that can be required of a public service company is limited to such service as the company has professed to render. *Browne v. Brandt*, [1902] 1 K. B. 696; *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086. It can, of course, be compelled to give the service required in the charter. *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309; *Independent School District of Le Mars v. Le Mars City Water & Light Co.*, 131 Ia. 14, 107 N. W. 944. The profession of the company is, however, not limited by the charter, but includes such service as it reasonably should render. *Haugen v. Albina Light & Water Co.*, 21 Or. 411, 28 Pac. 244. *Cf. Tampa v. Tampa Water Works Co.*, 45 Fla. 600, 34 So. 631. The fact that the particular service required is unprofitable is no defense. *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 512, 52 N. E. 292; *Savannah & Ogeechee Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937. On these principles a court can require a public service company to carry out improvements which will bring the service up to the efficiency which the company can reasonably be said to have professed; and the improvement required in the principal case seems within the limits of such service.

QUASI-CONTRACTS — WAIVER OF TORT — EFFECT ON TITLE. — B., being in possession of A.'s opals worth £400, sold them to C. without mentioning A.'s ownership. A. sued B. in detinue and took judgment by consent for £750. The pleadings in this action were framed to some extent on the theory of assumption, although the evidence was clear that there was no contract between A. and B. B. became bankrupt and A. sued C. in detinue. *Held*, that he cannot recover. *Bradley & Cohn, Ltd., v. Ramsay & Co.*, 106 L. T. R. 771 (Eng., C. A., June, 1912). See NOTES, p. 171.

RAILROADS — RAILROAD CROSSINGS — CONSTITUTIONALITY OF ORDINANCE REQUIRING RAILROAD TO CONSTRUCT A VIADUCT SUITABLE FOR USE BY STREET RAILWAY. — A city council by the authority of the legislature passed an ordinance requiring a railroad to construct over its tracks at a highway crossing a viaduct strong enough to accommodate a street car line. The street railway was not required to contribute. *Held*, that the ordinance is not unconstitutional. *Missouri Pacific Ry. Co. v. City of Omaha*, 197 Fed. 516. See NOTES, p. 169.

RAILROADS — TITLE TO LAND OR RIGHT OF WAY — RIGHT OF OWNER TO OUST RAILROAD WRONGFULLY IN POSSESSION. — A railroad company paid consideration for certain lands and constructed its roadway upon them. The plaintiff was cognizant of this occupancy, but believed the title of the railroad company to be unassailable. After several years, it developed that the plaintiff had an unclouded title to the land, and she brought suit to obtain possession. By statute it was provided that a railroad must pay compensation before entrance upon land for the purpose of condemnation. *Held*, that the plaintiff cannot recover possession, but can recover only the value of the land as of the date when the railroad took possession. *Pons v. Yazoo & Mississippi Valley R. Co.*, 59 So. 721 (La.).

It is a general doctrine that when a railroad occupies land without having employed its privilege of eminent domain the rightful owner may bring ejectment. *Louisville, St. L. & T. R. Co. v. Rudd*, 30 S. W. 604 (Ky.); *McClinton v. Pittsburg, F. W. & C. Ry. Co.*, 66 Pa. St. 404. See *State v. Summerville*, 104 La. 74, 86, 28 So. 977, 982. Many cases hold that where entry and improvement are made with the owner's knowledge and sufferance he is estopped from later ousting the railroad. *Taylor v. Chicago, M. & St. P. R. Co.*, 63 Wis. 327, 24 N. W. 84; *Lawrence v. Morgan's, etc. Steamship Co.*, 39 La. Ann. 427, 2 So. 69. But the law prescribes a mode by which a railroad may lawfully obtain property, and there seems no sufficient reason why the courts should be more ingenious in inferring estoppels for the benefit of wrongdoing railroads than for the benefit of other trespassers. *Hooper v. Columbus & Western Ry. Co.*, 78 Ala. 213; *St. Joseph & Denver City R. Co. v. Callender*, 13 Kan. 496. But see 2 ELLIOTT, RAILROADS, 2 ed., § 1055. It is difficult to see how the court applies the estoppel doctrine to the facts of the principal case. *Cf. Bradley v. Missouri Pacific Ry. Co.*, 91 Mo. 493, 4 S. W. 427. Some courts, however, urge that public convenience demands that a railroad should not be ousted. *Indiana, B. & W. Ry. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446. Whether the common-law property right of the landowner should be sacrificed to utilitarianism admits of argument. *Stretton v. Great Western & Brantford Ry. Co.*, 40 L. J. Eq. 50. See LEWIS, EMINENT DOMAIN, 2 ed., § 648. In any event the courts could in extreme cases protect public interests by staying execution long enough to give the railroad reasonable opportunity to expropriate. See *Illinois Central R. Co. v. Le Blanc*, 74 Miss. 650, 21 So. 760; *Pittsburgh & Lake Erie R. Co. v. Bruce*, 102 Pa. St. 23, 35. *Contra, Strong v. Brooklyn*, 12 Hun (N. Y.) 453. The reasons advanced by the court hardly warrant the handing over of land, demanded by the rightful owner, to a railroad which has never employed the machinery of eminent domain.

RECEIVERS — LIABILITY OF LESSOR RAILROAD FOR EXPENSES OF RECEIVER OR LESSEE. — A lease of a railroad provided for assumption of the lessor's liabilities and forfeiture upon twelve months' default on the lessee's covenants. Upon insolvency of the lessee road, a receiver was appointed who operated for a while and then renounced the lease. During operation, the receiver made expenditures to protect the lessor's franchise which made the result of the operation a loss. *Held*, that the lessor is chargeable with the loss. *Pennsylvania Street Co. v. New York City Ry. Co.*, "Termination of Lease Proceeding," C. C. A., Second Circ., 1912. See NOTES, p. 165.

TITLE, OWNERSHIP AND POSSESSION — WILD LANDS. — The plaintiff as security for a debt conveyed certain wild lands to the defendant, who paid taxes on the land but never entered into actual possession. The statute of limitations provided that no suit to redeem a mortgage should be brought more than twenty years after the mortgagee obtained possession of the land. The plaintiff brought suit to redeem more than twenty years after the con-

veyance. *Held*, that the plaintiff's claim is barred. *Kirby v. Cowderoy*, 107 L. T. R. 74 (Eng., P. C., June 18, 1912).

The court in the principal case holds that the statutory requirement of possession is satisfied by the conveyance to the mortgagee and the payment of taxes on the property. It is at least doubtful whether a conveyance of lands not in the actual possession of anyone can confer a constructive possession on the grantee. That a mortgage though in form an absolute deed could have this effect is even less reasonable, since a mortgagor usually remains in possession. Furthermore, any possession flowing from the fact of conveyance can at most be only constructive, and it is straining the language of the statute to include such a possession. *BRIT. COL., REV. STAT.*, 1897, c. 123, § 40. An analogy may be drawn to the case of suits to quiet title where actual possession of the plaintiff must be shown even in the case of wild lands. *Cantlin v. Holliday-Klotz Land & Lumber Co.*, 151 Mo. 159, 52 S. W. 247. If the mortgagee was not originally in possession, it is difficult to see how he could enter by paying the taxes. This seems to be an evidence of claim of ownership rather than an act of possession. *Pharis v. Jones*, 122 Mo. 125, 26 S. W. 1032.

TORTS — DEFENSES — RELEASE OF ONE JOINT TORTFEASOR WITH RESERVATION OF RIGHTS AGAINST OTHERS. — The plaintiff, having brought suit against several defendants jointly liable for injuries sustained in consequence of their negligence, gave a release to one of the defendants, reserving his rights against the others. *Held*, that the release operates as a bar to the suit against the co-defendants. *Flynn v. Manson*, 126 Pac. 181 (Cal.).

In the analogous case in contracts where a release is given by an obligee to one of several joint obligors, reserving rights against the others, it is well settled that the release will be interpreted as a covenant not to sue the party to whom the release is given and does not bar action against the others. *Dickinson v. Metacomet National Bank*, 130 Mass. 132; *Benton v. Mullen*, 61 N. H. 125. Though the authorities are in conflict, the modern tendency has been similarly to interpret such a release of one of several joint tortfeasors. *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784; *Walsh v. New York Central & H. R. R. Co.*, 140 N. Y. App. Div. 1, 124 N. Y. Supp. 312. The opposite result reached in the principal case seems less desirable, because it fails to carry out the intent of the parties. See 16 HARV. L. REV. 529; 22 HARV. L. REV. 458.

WATERS AND WATERCOURSES — NATURAL LAKES AND PONDS — ENCROACHMENT UPON HIGHWAY AND LANDS BEYOND: TITLE TO LAND UNDER WATER BETWEEN HIGHWAY AND NEW SHORE LINE. — The water of Lake Erie by gradual erosion washed away a public highway along the shore and also a portion of the land belonging to the plaintiff's lessor which bordered upon the highway. The crown leased to the defendant all the land under the waters of Lake Erie in front of the property of the plaintiff's lessor. The defendant entered and drilled for oil in the land under water between the original boundary of this property and the new shore line. *Held*, that the plaintiff may recover in an action of trespass. *Volcanic Oil & Gas Co. v. Chaplin*, 22 Ont. Wkly. R. 800.

The crown has title to the land under the water on the Canadian side of the Great Lakes. *Attorney General v. Perry*, 15 U. C. C. P. 329. And the owner of land beneath waters ordinarily gains title to land of a riparian owner gradually washed away and covered by the encroachment of the waters. *In the Matter of Hull & Selsby Ry.*, 5 M. & W. 327; *Widdecombe v. Chiles*, 173 Mo. 195, 73 S. W. 444. It is well settled that when land is bounded by a public highway on the shore riparian rights do not vest in the owner of such land. *Cook v. City of Burlington*, 30 Ia. 94; *Schools v. Risley*, 10 Wall. (U. S.) 91. But by the great weight of authority when water slowly encroaching reaches

the boundary of an inland proprietor he becomes subject to loss by erosion, and has the right to gain by accretion. *Welles v. Bailey*, 55 Conn. 292; *Foster v. Wright*, 4 C. P. D. 438. The court in the principal case, though accepting the general principle of loss by erosion, holds that when the boundary to property is made fixed and definite, as it is in the case of property not originally riparian, it will not change with the movements of the shore line. This view finds support when at the time of the conveyance of the property an intention was clearly shown by the terms of the conveyance or the nature of the waters that riparian rights should be withheld from the land. *Cook v. McClure*, 58 N. Y. 437; *Gilbert v. Eldridge*, 47 Minn. 210, 49 N. W. 679. There was no such intention in the principal case and it is submitted that the opposite result would be preferable.

WATERS AND WATERCOURSES — PERCOLATING AND SURFACE WATERS — EXTENT OF RIGHTS. — The plaintiff collected artesian, spring, and seepage water from his land into a pond. In conveying this water by ditches to different parts of the land considerable quantities percolated through the soil. This artificially created percolating water was conveyed into a ditch running along a right of way belonging to the defendant, who used the water for irrigating purposes for nine years. Held, that the defendant acquired no right to the water. *Garns v. Rollins*, 125 Pac. 867 (Utah).

According to the English rule, a landowner can acquire no rights in the flow of percolating waters from other lands to his own, since the owner of the soil to whom they belong may dispose of them as he pleases. *Chasemore v. Richards*, 7 H. L. Cas. 349; *Frazier v. Brown*, 12 Oh. St. 294. The lower court in the principal case, proceeding on the erroneous ground that the waters in question were natural percolating waters, refused to apply the English doctrine. Instead, the reasonable use doctrine, adopted by a majority of American courts, was followed, giving an adjoining landowner a vested right in the flow of such percolating waters as are not necessary to the reasonable use of another's land. *Katz v. Walkinshaw*, 141 Cal. 116, 74 Pac. 766; *Smith v. City of Brooklyn*, 18 N. Y. App. Div. 340, 46 N. Y. Supp. 141. See 16 HARV. L. REV. 295. The water in question, however, was not naturally percolating, but merely surface or waste water; and on this ground the upper court in accordance with all past authority held that an adjoining landowner could acquire no rights in its flow from the land of another. *Broadbent v. Ramsbotham*, 11 Exch. 602. See *Frazier v. Brown*, *supra*, 300. It is submitted that the argument of social utility, which was mainly responsible for the introduction of the reasonable use doctrine as to percolating waters, is equally applicable to surface waters. See 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 59.

BOOK REVIEWS.

THE UNDERLYING PRINCIPLES OF MODERN LEGISLATION. By W. Jethro Brown. London: John Murray. 1912. pp. xx, 331.

Dr. Brown has essayed in his latest book a social philosophical theory of law and of law-making. Apart from his method of accomplishing the task, his undertaking it at all is an event of capital importance, since it evidently marks the swinging into line of English jurists in the general movement toward philosophical jurisprudence. But his method has significance also. On the Continent, the return to a philosophy of law came by way of reaction from the historical school, and yet chiefly from a development of that school. Kohler's

school of Neo-Hegelian jurists build upon what is sound in the historical method. In the same way in France, while the recent so-called "revival of natural law" represents a reaction from the historical school, it got its decisive impetus from adherents of that school rather than from the remnant of the metaphysical school of the nineteenth century. Dr. Brown began in jurisprudence as a Neo-Austinian. Accordingly his philosophical jurisprudence is both a reaction from the analytical school and a building upon it, and thus promises a new type of philosophy of law of a truly indigenous character, instead of the usual borrowing or adaptation from continental Europe.

Beginning with a statement of the "challenge of anarchy," of the anarchist position that "the best social order is one where men live their lives, not under the compulsory regulation of the state, but in voluntary coöperation," and an examination of the anarchist's objections to government, he points out that the whole movement of the modern world is away from anarchy and toward more and stronger government. What, then, he asks, are the principles of modern government? What is the ideal of modern law-making? In answering these questions Dr. Brown's method is much akin to that of the Neo-Kantian jurists who seek to discover the ideal of an epoch and to derive their principles of criticism therefrom. He asserts "the dominating influence of a single ideal in the politics of the nineteenth century," and he finds in the movement for democratic institutions, the movement to secure the citizen from undue state interference, and the movement to "extend social and individual responsibility," three phases of a single movement toward a common goal; three phases of "a progressive realization of the nature of the goal toward which the national life is slowly traveling." As might be expected of one who had come under the influence of Lord Acton, that ideal is liberty, "sought at one time in a form of polity, at another time in the protection of the subject from the tyranny of political institutions, and at yet another time in various forms of state control."

In thus linking the modern movement in jurisprudence and legislation with the Benthamite individualism of the immediate past, the author has naturally run foul of two sorts of critics. The old style individualist cannot accept his conception of liberty, taking liberty to mean the maximum of individual self-assertion unrestrained by state or society. An example may be seen in Mr. Abbott's review of the book in 12 *Columbia Law Review* 477. The orthodox Anglo-American jurist, who still despises philosophy of law, for reasons that were perfectly valid when philosophy of law meant the metaphysical systems of the fore part of the last century, looks askance at the idealistic interpretation which finds a real unity of development underlying the change from *laissez faire* to social control. An example may be seen in the recent review of the book in 28 *Law Quarterly Review* 418. It is too late now to reason with the former. To the latter we may say, consider the applications of the method and observe whether, apart from the details of the author's execution of his task, these applications are not more fruitful than anything we have had in the past. Dicey's method of observation of the currents and cross currents of thought and their relation to legislation leads to the conclusion that if we can know what the young men of to-day think, we shall know what legislators and courts will enact and adjudicate a generation hence. What we ought to do in the present in legislation and adjudication is a profitless question. For what we shall do was determined long ago when our jural minds were formed. The revival of philosophical jurisprudence, with all the disregard of historical and geographical considerations of which some reviewers are complaining, is a wholesome and indeed a necessary reaction from such a mode of thought.

Nineteenth-century individualism identified justice with the maximum of individual self-assertion. Accordingly liberty required a minimum of interference with such self-assertion. For these ideas Dr. Brown substitutes self-

realization as the end, and promotion in whatever way of the maximum of self-realization as the means. In this way the ideas of the Benthamite individualists are not to be wholly rejected, they are rather to be curbed. They represent a stage in the development of the ideas of justice and liberty, not a set of ideas which have been completely superseded and have no more than a historical interest. Self-realization includes self-assertion, and therefore the attempt of the Benthamites to secure self-assertion was a legitimate undertaking, pressed to extravagant consequences because self-assertion was taken for the whole. This position is not very different from that taken by those pragmatists and sociologists who see in justice the satisfaction of the maximum of human demands at the least cost to other human demands. In any event individual self-assertion has a legitimate place in the scheme. Nor is the theory very different from the doctrine of liberty through society which so many sociologists have been preaching. Dr. Brown tells us that "the ideal of liberty has two aspects. It affirms from one point of view the duty of the state to regard each citizen as an end in himself; from another it affirms the right of the state to regard the citizen as a means to the general well-being." Accordingly he finds the two fundamental principles in "the worth of man and the unity of society."

British sociology has been slow to respond to the psychological movement. The author, however, if he has not read Ward, has read and made good use of Dr. Ross's "Social Control and Social Psychology." One could wish that he had devoted more attention to the German social philosophical jurists. One cannot but feel that the idealistic interpretation of jurisprudence and of the history of legislation, the finding of the end of law in liberty and much of the discussion of the idea of liberty, is too much in the vein of the metaphysical jurisprudence of the last century. But the task of the social philosophical jurist who writes in English at present is a hard one, and much may be forgiven a pioneer whose work is as well done as Dr. Brown's work in this book.

Unhappily there is no index, a defect which we have come to accept with resignation in German and French books, but which is an unacceptable innovation in an English book.

R. P.

A SHORT HISTORY OF ENGLISH LAW. From the Earliest Times to the end of the Year 1911. By Edward Jenks. Boston: Little, Brown, and Company. 1912. pp. xxxviii, 390.

A history of the whole of English law in less than four hundred pages for the average student whose time is limited is the task which Mr. Jenks has set for himself and has skilfully performed. To state in readable form with some attempt at completeness the development of our law from the Anglo-Saxon dooms to the year 1911 requires at least a winning style, a clear head, and a sense of historical perspective. The author's reputation in these respects has been sustained by this book. We regret, however, the self-imposed restriction in his discussion of the origin and development of the courts. This is partly the cause of his devoting only sixty-seven pages to legal history down to 1272. Here, as elsewhere, he has shown us that he can think for himself; and, even if other writers have covered this period fully, it is a pity that we cannot have Mr. Jenks's full strength. From 1272 to modern times, a period less authoritatively covered by others, we have about three hundred pages; and here again, after admiring the agreeable style, the clever articulation of subject matter, and the general accuracy, the feeling is one of regret at not having a complete scholarly work rather than a "modest, but comprehensive, manual." One asks oneself whether a sketchy account of such a great subject is really worth while.

Is not a book for the average student whose time is limited, or for the lawyer who wishes to get hastily a superficial account, clearly and briefly stated, of the historical origin of some doctrine, disappointing from a source which might well supply advanced scholarship?

Nevertheless, given the author's problem, it is difficult to see how it could be better performed. The author has wisely avoided the "vertical" method of tracing each institution from its origin, and treats the history of the law in four natural periods: Pre-Norman; 1066-1272; 1272-1660; 1660-1911. The chapter on the law of chattels and the chapters covering contract and tort are particularly well done. He places Glanvil's writ of debt beside his writ of right, and shows their striking resemblance. Debt was essentially a real action, and likewise its sister remedy, detinue. The explanation of the common notion based on Bracton, Book III, ch. 3 (4), that there never was any real action for a chattel he finds in a custom designed since Glanvil's day at first to protect the plaintiff in detinue, *i. e.*, that the plaintiff must put a price on his chattel in order that he might recover its value if the defendant had parted with it. The court thus "got into the habit of giving judgment for the return of the chattel *or its value*, an alternative not unnaturally interpreted by defendants in their favour." (pp. 57-59.) The chapters on contract and tort are models of compressed exposition. Here again there is enough independent thinking to tantalize the reader at the lack of space.

The final period he divides into chapters on: Modern Authorities and the Legal Profession, Reform by Equity, Changes in the Land Law, New Forms of Personal Property, Contract and Tort, Reform in the Criminal Law, and Modern Civil Procedure. The treatment here in special topics might be subject to the criticism that the reader's attention is not sufficiently concentrated on the broad underlying principles of reform in the nineteenth century, but the discussion in the chapters on reform in criminal law and on civil procedure makes this objection less pertinent. More space might well be given to the law merchant. Brevity has led to one inaccuracy. The liability of a husband for his wife's contract is placed upon grounds of agency.¹ This, of course, is not always true. The liability is often quasi-contractual.² The author himself has recognized in another place that a case may be put that breaks down the theory of an express agency.³

J. W.

HISTORICAL INTRODUCTION TO THE ROMAN LAW. By Frederick Parker Walton, Professor of Roman Law and Dean of the Faculty, McGill University, Montreal. Second Edition, Revised and Enlarged. Edinburgh and London: William Green and Sons. 1912. pp. xvii, 392.

In the second edition Professor Walton's book is not merely increased by half its former bulk, but it is revised and greatly improved throughout, so as almost to be a new book. Moreover, especial endeavor appears to have been made to bring it up to date in all respects. The latest and best authorities have been studied zealously and put to good use. In a field so long trodden and retrodden by masters of law and of history, the writer of a student's text may not be asked to do more.

The book was written primarily for Quebec, to serve as a prelude to the study of the Institutes in a jurisdiction where dogmatic study of Roman law is a necessary basis of legal education. With us, where dogmatic study of Roman law is of value chiefly, if not solely, as an introduction to comparative law, and

¹ P. 306.

² 9 Col. L. Rev. 72.

³ Jenks, Digest of English Civil Law, Book I, pp. 56, 57.

historical study of Roman law as a basis for institutional history, it may be thought that such a scheme of a historical introduction to the Institutes followed by study of the latter is ill advised. The historical course is too brief for the student of institutions, who will not desire the dogmatic course, and the combined course requires too much time for the student of Anglo-American law, for whom the system of Roman law is the main thing. Yet the book will prove useful to students in the United States, for whom Muirhead's classical text is too long and goes into too much detail.

For a long time histories of Roman law were written from the standpoint of the idealistic interpretation. Later Jhering and Voigt suggested an ethnological interpretation. British writers, who almost uniformly adopt a political interpretation in jurisprudence, have usually approached legal history from that point of view. But the influence of the tendency toward an ethnological interpretation was noticeable in Muirhead, and is very marked in the present book, in which some three chapters are given over to matters of archæology and ethnology. It cannot be said, however, that any special relevance of these matters to the history of Roman law is made out. Indeed Cuq has pretty well disposed of the attempts to get beyond generalities in this connection and trace race influence into details. And the well-settled British bent for the political interpretation is evidenced in the space given to Roman political institutions.

If one may venture such a heresy, it may be doubted whether these newer interpretations of legal history have achieved much beyond a possible broadening of the juristic field of vision. It has been said that the ethnological interpretation has not taken us beyond some generalities and far-fetched speculations. Kühlenbeck's biological interpretation does not appear to be giving us a different history of Roman law from that with which we have been familiar. Nor has the political interpretation resulted in more than exposition of Roman legal and political institutions side by side. After all, Puchta's exposition of the history of Roman law as a gradual unfolding of the idea of right and justice appears to be the one case in which the interpretation has borne fruit in the narrative. Whether the so-called external history of the two great legal systems of the world may not be left to the college courses in history and the internal history given the whole measure of the time which the professional student can devote to these subjects may perhaps deserve reconsideration. But the text book, above all things, must be up to date. And we can have no just quarrel with an author who is in entire accord with the fashions of the day.

The new edition of Professor Walton's book may be recommended to students of law in the United States, who, so far as they study Roman law at all, pursue a dogmatic or systematic course only, in connection with which a brief but reliable exposition of its history is obviously desirable.

R. P.

THE LAW AND CUSTOM OF THE CONSTITUTION. By Sir William R. Anson, Bart. Volume I: Parliament. Fourth Edition. Reissue Revised. Oxford: The Clarendon Press; London, New York, & Toronto: Henry Frowde. 1911. pp. xxvi, 404.

The fourth edition of Sir William Anson's standard work was reviewed in 23 HARV. L. REV. 575. The reissue has been revised to indicate the changes made in the fundamental law of the land by the Parliament Bill of 1911. This bill has worked such a revolution in the constitutional law of Great Britain that no treatise on the constitution is adequate for present use unless it embodies these changes. In order to equalize the conditions under which

the two great parties seek political supremacy so that the Unionist party shall no longer reap advantage from its permanent control of the House of Lords, the Liberal party has taken from the Upper House the right to participate in legislation to any substantial degree; thus imposing on the country a unicameral rather than a bicameral system of government. This change may not be a permanent one. The preamble of the bill states that "it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis." Yet in the eighteen months since the bill became law, the Ministry has not brought in any bill for reform of the Lords, and for some time to come subjects of more popular interest will be stirring in English politics; so we may take it that the law is more than a temporary solution of the constitutional problem.

The present revision is sufficiently thorough to keep the work up to its former high standard of usefulness until a new edition becomes necessary. The subjects which have received especial discussion are the increased importance of the Speaker of the House of Commons with the danger that the office may become a political one (pp. 149-151); and the effect of the conflict between the two Houses over the passage of the bill in establishing the custom of the constitution that the Commons will prevail in any sustained conflict between the two Houses by securing the royal promise to create a sufficient number of new peers to pass the desired legislation (pp. 283-290).

J. R. MCL.

THE WORLD'S LEGAL PHILOSOPHIES. By Fritz Berolzheimer. Translated by Rachel Szold Jastrow. With an introduction by Sir John MacDonell and by Albert Kocourek. Boston: The Boston Book Company. 1912. pp. lv, 490.

A HISTORY OF FRENCH PRIVATE LAW. By Jean Brissaud. Translated by Rapalje Howell. With an introduction by W. S. Holdsworth and John H. Wigmore. Boston: Little, Brown, and Company. 1912. pp. xlviii, 922.

A TREATISE ON THE LAW OF STREET RAILWAYS. By Henry J. Booth. Second Edition. Revised and Enlarged by Isaac C. Sutton and Paul H. Denniston. Philadelphia: T. and J. W. Johnson Company. 1911. pp. cxi, 922.

THE FOURTEENTH AMENDMENT AND THE STATES. By Charles Wallace Collins. Boston: Little, Brown, and Company. 1912. pp. xxi, 220.

THE NEW COMPETITION. By Arthur Jerome Eddy. New York: D. Appleton and Company. 1912. pp. 375.

THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW. By Amos S. Hershey. New York: The MacMillan Company. 1912. pp. xlviii, 558.

A DIGEST OF ENGLISH CIVIL LAW. Book III, Sections I and II. Property (continued). By Edward Jenks. London: Butterworth and Company. Boston: The Boston Book Company. 1912. pp. l, 669-792, 13.

FEDERAL COURTS AND PRACTICE. By John A. Shields. New York: Banks Law Publishing Company. 1912. pp. v, 874.

LAW OF EVIDENCE AS ADMINISTERED IN BRITISH INDIA. By Mahim Chandra Sarhar. Calcutta, India: M. C. Sarhar and Sons. 1913. pp. cxvi, 828.

ENACTMENTS IN PARLIAMENT specially concerning the Universities of Oxford and Cambridge, the Colleges and Halls therein, and the Colleges of

Winchester, Eton, and Westminster. By Lionel Lancelot Shadwell. In four volumes. Oxford: The Clarendon Press; London: Henry Froude. 1912. pp. xxxix, 360, 407, 420, 384.

COURTS, CRIMINALS, AND THE CAMORRA. By Arthur Train. New York: Charles Scribner's Sons. 1912. pp. 253.

VALUATION OF PUBLIC SERVICE CORPORATIONS. By Robert H. Whitten. New York: The Banks Law Publishing Company. 1912. pp. xl, 798.

HARVARD LAW REVIEW.

VOL. XXVI.

JANUARY, 1913.

No. 3.

THE JURISDICTION OF COURTS OVER FOREIGNERS.

I. EUROPEAN LAW.

THE extent of the judicial jurisdiction of a sovereign, especially where the jurisdiction depends on some power over the person of the defendant, is a puzzling question as to which the courts of civilized nations are very far from an agreement. Nor is this disagreement likely to be removed by any international movement such as the Institute of International Law. Each state is wedded to its own views as to its power over foreigners, while at the same time it is apt to deny to all other states the extreme powers over its own citizens which it exercises itself over foreigners. The fact of this extreme claim by a state of jurisdiction for itself, coupled with the denial of similar jurisdiction for other states, leads to curious questions as to the legality within a state of the exercise of such extreme jurisdiction, and as to the action of third states, when such jurisdiction is brought in question in their courts. It seems that the most satisfactory way of dealing with the subject is to examine in the case of the principal states their claim of jurisdiction for their own courts, and their attitude toward similar jurisdiction by foreign courts. As an indispensable prerequisite to a study of the present law it is first necessary to make some examination of the state of affairs in the Roman law.

Before entering upon this examination, however, it is well to remember that the question of jurisdiction may present itself in either of two aspects. The jurisdiction which the sovereign may exercise if he chooses is one of these aspects. The sovereign jurisdiction of a state is, of course, fixed by a power outside itself. That power is the rule of international law by which sovereign jurisdiction is limited; and that rule, along with other principles of international law, is accepted by the sovereign because it is only thus that he can claim membership in the family of civilized nations. By reason of his desire to be admitted into this company the sovereign of each state accepts the principles of international law as those by which he will be governed; and the limits of his jurisdiction as fixed by that law become therefore a part of the constitution of his state. He has no right to extend this jurisdiction by any legislative act. To be sure, as a portion of the municipal law the principles in accordance with which international law limits jurisdiction may come to be interpreted by the courts; and the power of two independent courts to interpret a principle of law involves a power to differ in interpretation. Thus the courts of France and those of Italy or England may differ as to the extent of jurisdiction over foreign persons or things that may be exercised by a court; and in that sense it may be said, if we choose to speak so loosely, that the principles of jurisdiction differ. The administration of justice necessarily involves the power to interpret the entire law, whatever its source. But the exercise of the legislative power does not extend so far. The sovereign can legislate (*i. e.*, alter the law) only with regard to that part which is peculiar to his own dominions. He cannot alter international law by legislation.

It follows that if a statute should attempt to extend the jurisdiction of a court beyond the bounds fixed by international law, the statute would be void, even though the court (as is the case, for instance, in England) were bound to obey. It is true that a court erroneously interpreting international law as permitting the jurisdiction would not hold the statute void; but if it recognized that the statute transcended the legal limits of jurisdiction it would regard it as in fact void, even though constrained to act under it.¹

¹ Blackburn, J., in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 159 (1870).

When, however, the international limits of a sovereign's judicial jurisdiction have been settled and it becomes a question of how this jurisdiction shall be exercised, it lies naturally within his discretion whether a power shall be executed at all, or if so in which of his courts. And it remains for him, therefore, to settle the jurisdiction of each court that he creates according to his pleasure. In this internal or constitutional sense the jurisdiction of courts lies entirely within the sovereign's law, and may be fixed by legislation at his pleasure.

A. Roman Law.

While no international bounds were fixed to the power of the Roman state, nevertheless a rule of jurisdiction grew up in the Roman law which is the basis of international jurisdiction as understood in the modern European states. That is the principle "*Actor sequitur forum rei*."² The code of Justinian added to this the principle that the *forum rei* might be departed from in real actions,³ and also that the breach of an obligation might form the subject of an action where the unlawful act was committed or where the contract was made or to be performed.⁴ A counter-action might also be introduced where the principal action had been brought.⁵ These provisions passed into the common law (*droit commun*, *gemeine Recht*) which was universally received throughout Europe and is therefore the basis of its present law.

B. The Common Law of Europe.

Derived from the principles of Roman law, the so-called Common Law of Europe prevails with regard to the jurisdictions of courts except in so far as it has been modified by the peculiar provisions

² See Salkowski, *Institutes and History of Roman Private Law*, Whitfield's translation, p. 937.

³ See Cod. 3. 19. 3. "*Actor rei forum, sive in rem sive in personam sit actio, sequitur; sed et in locis, in quibus res propter quas contenditur constitutae sunt, iubemus in rem actionem adversus possidentem moveri.*" (Gratian, A. D. 385.)

⁴ "*Unusquisque in qua provincia delinquit aut in qua pecuniarum aut criminum reus sit, sive de terra et de terminis sive de proprietate sive de possessione aut hypotheca vel de qualibet alia occasione, illic etiam iuri subiaceat, . . . ut ultra terminos litigare non quaerat.*" Nov. 69, c. 1.

⁵ Nov. 69, c. 2. See this and other references in Mackenzie's *Roman Law*, 7 ed., 350-351.

of the French civil code and other codes based upon it. This modification will be later considered.

(1) *Right of a Foreigner to Sue.* According to the common law, which is followed in most of the codes of civil procedure, a foreigner has a full right to seek the courts of a country for the purpose of bringing any action which is in other respects within the competence of the court. This right is most liberally expressed in an article of the German code of civil procedure:⁶ "A foreigner who cannot sue according to his own law may nevertheless sue, if he is competent by the law of the court in which he brings suit." The code also provides that "any person who may contract may sue."⁷ This is also the law in Austria and Italy,⁸ in Belgium since the Procedure Act of 1876,⁹ in Holland,¹⁰ Luxembourg,¹¹ and Monaco.¹² It is also, it seems, the law of South America; at least, this is the case in Columbia¹³ and Peru.¹⁴

In some states foreigners are required before bringing suit to furnish a guaranty for the payment of a judgment against them for costs in case their suit fails (*cautio judicatum solvi*); and, as will be seen, this is provided in France wherever a foreigner is allowed to sue. This seems to be regarded in some of the states as in derogation of the common law, and as opposed to the principle of free access to the courts.¹⁵ It seems, however, tolerably clear that the necessity of furnishing such security is not in derogation of the right to sue. Where a native brings suit he can always be reached and held to answer for a judgment for costs. In the case of a foreigner, however, he may leave the state before judgment, or he may in fact never have entered its borders. If he were allowed free access to the courts without security for costs, his risk in bringing suit would be less and the risk of his opponent would be

⁶ See Civilprozessordnung, section 55.

⁷ See *ibid.*, section 52.

⁸ See Bar, International Law, Gillespie's translation, 2 ed., p. 884.

⁹ See Mons, 16 Jan. 1891, Pas. Belg. 1892, 3, 161, 20 Clunet 443; Antwerp, 27 Aug. 1910, 36 Clunet 235.

¹⁰ Amsterdam, 28 April 1893, 21 Clunet 184.

¹¹ See Syndics v. Manes, 5 Jan. 1887, 14 Clunet 674.

¹² See Rolland in 17 Clunet 247.

¹³ See E. Champeau in 21 Clunet 930, at p. 937.

¹⁴ See P. Pradier-Fodéré in 6 Clunet 250.

¹⁵ See what is said on this point by E. Champeau, Condition of Foreigners in Columbia, 21 Clunet 930, 937.

greater than in the case of a native plaintiff. Compelling him to furnish security therefore simply puts him on an equality with the native plaintiff. In the German code of civil procedure a foreigner is required to furnish security before he sues;¹⁶ and in most of the states where such action is allowed this is also required. In Italy, however, the opposite view is taken and carried to an extreme. Not only does the law permit a foreigner to sue without furnishing security for costs, but a foreign plaintiff is given a right to avail himself of the law of December 6, 1865, amended July 19, 1880. By the terms of this law parties who cannot furnish the money necessary to establish their legal rights in court may obtain from the government the money necessary to pay expenses, and the gratuitous assistance of attorneys and advocates. A foreigner may therefore enjoy the privilege of having his legal expenses paid by the Italian government.¹⁷

The question whether a foreign corporation may sue on the same terms as a foreign individual is discussed at length by von Bar.¹⁸ The prevailing doctrine of the Continent appears to allow foreign juridical persons to stand on the same basis as natural persons. There is, however, considerable authority the other way, on the ground that the public policy of a state is interested in determining how far artificial persons may be given standing. The German Reichsgericht has given with force the reasons for allowing suit by a foreign corporation, even though the public policy of the state may forbid it to do business in the state.¹⁹

(2) *Suit against a Foreigner.* As a general rule the proper court for suit is that of the defendant's domicile, and a defendant may always be sued at his domicile. Any one, therefore, whether a foreigner or a native, who is domiciled within the country may be sued there.²⁰ In case of one formerly domiciled in the country it has been held that he may be sued unless some other domicile is

¹⁶ See Civilprozessordnung, section 110.

¹⁷ See P. Fiore, *Droit International Privé*, tr. Antoine, vol. i, p. 325.

¹⁸ See Bar, *International Law*, *supra*, § 105.

¹⁹ *Phenix Fire Insurance Co. v. M.*, 14 April 1882, *Entscheidungen des R. G. Civilsachen*, 6, 134, 139-142.

²⁰ See Bar, *International Law*, pp. 908, 910 n.; P. Esperson, *Competency in Italian Law*, 10 *Clunet* 263; P. Pradier-Fodéré, *Legal Condition of Foreigners in Peru* 6 *Clunet* 250.

shown elsewhere.²¹ So where a Jew domiciled in Germany left that country and established himself in Russia, where a Jew cannot obtain a judicial domicile, it was held that he might be sued at his last German domicile.²²

Whether a foreigner present or temporarily resident, but not domiciled, may be sued is not clear. In Switzerland this appears to be allowed;²³ and so where a female circus performer stayed in the place where she was performing, it was held that she had in that place a residence sufficient to permit suit against her there.²⁴ But the doctrine appears to have been confined to cases where there was no fixed residence or domicile elsewhere. There is a little authority for saying that where the foreigner is personally present and served with the citation he may be made subject to the jurisdiction. It has been so held in Peru,²⁵ and the same has been asserted to be true in Italy.²⁶ In this matter von Bar says:²⁷

"Every one, then, so long as he is personally present in any state, is subject to the sovereignty of that state in so far as relates to his person, and so long as he possesses property or makes claim to property there, in so far as concerns that property and these claims. It is, then, not repugnant to principles of international law, that the debtor himself, if he happens to be in the country, should be seized, or his property arrested; and in consequence a judgment be pronounced without the necessity of establishing any other right of jurisdiction, giving decree, in the former case to the amount of caution required for liberation, in the latter to the amount of the value of the goods arrested. Such a jurisdiction, however, rests upon an actual exercise of power at the moment of detention, and ultimately, therefore, must be referred to a complete distrust of the judicial system of other states. . . . It seems right, therefore, to refuse international recognition to such a jurisdiction, even as regards the simple *exceptio rei judicatae*."

²¹ See Bar, *International Law*, p. 910 n.; German Reichsgericht, 15 Jan. 1891, *Entscheidungen des R. G., Civilsachen*, 27, 400.

²² *Norddeutsche Grundkreditbank v. E.*, *Entscheidungen des R. G., Civilsachen*, 34, 392, 22 *Clunet* 850.

²³ See *Trib. Fed. Switz.*, 26 Jan. 1899, 26 *Clunet* 875, *Semaine Judiciaire* [1899] 268.

²⁴ *Schurmann v. Kasprzakow*, 4 March 1899, 27 *Clunet* 404, *Semaine Judiciaire* [1899] 430.

²⁵ See P. Pradier-Fodéré, *Legal Condition of Foreigners in Peru*, 6 *Clunet* 250.

²⁶ See P. Esperson, *Competency in Italian Law*, 10 *Clunet* 263. The opinion of this author is to the contrary.

²⁷ See Bar, *International Law*, p. 912.

This passage appears to represent the view usually held by the European courts.²⁸ It would thus seem to be the continental doctrine that territorial power does not necessarily confer judicial jurisdiction where the defendant has an actual domicile elsewhere.

A question of some difficulty arises when parties who are incompetent to sue or be sued in a court do in fact bring suit, and submit, so far as they are concerned, to the jurisdiction; must the court declare itself incompetent "of office"? that is, must the court refuse jurisdiction in spite of the consent of the parties? It is held in most jurisdictions that the court will not of itself insist on incompetence, but if the parties agree the court will entertain the suit.²⁹ It has also been mooted whether or not a third state will declare the courts of one state incompetent on the ground that a second state has jurisdiction, refuse to enforce its judgment, and thus, as the argument runs, lend its assistance to the second state in vindicating its jurisdiction. But the better view doubtless is that the courts of all states will refuse to enforce the judgment of a court which had no jurisdiction in the international sense; not that the rights of the third state may be vindicated, but that justice may be done between the parties. On this point von Barwell says:³⁰

"It is wrong in principle to recognize a foreign judgment or to put it into execution, if the foreign court must be regarded as incompetent, just because our courts cannot pretend to exercise jurisdiction in the case. To prevent encroachments on our own jurisdiction is not the only matter for consideration; the substantial point is that justice shall be worked out, *i. e.*, that we shall give legal assistance to the state which, in an international sense, has a right to judge."

Generally speaking, then, there is no jurisdiction over a defendant except at his domicile; but while a non-resident cannot usually be sued, there are nevertheless exceptional cases in which an action may be brought against him. The cases in which suit is commonly allowed are: (a) in case of a real action; (b) in case of contracts made or performable within the country or torts there

²⁸ See to this effect Rolland, *Competence of the Court of Monaco*, 17 *Clunet* 247, and a decision of the Superior Court of Monaco cited by him.

²⁹ Belgium: Court of Brussels, 14 Dec. 1897, 27 *Clunet* 1009. Denmark: Trib. Com. Copenhagen, 19 Dec. 1888, 18 *Clunet* 1018. Greece: Court of Appeal of Athens, 1896, 24 *Clunet* 618.

³⁰ Bar, *International Law*, p. 905 n.

committed; (c) in case of reciprocity; (d) in case of cross-claims; (e) in case of consent. In other cases the jurisdiction over a non-resident is regarded as "contrary to the law of nations."³¹

We must now consider each of these exceptions successively.

(a) *Real action*. It is of course a universally accepted ground of jurisdiction that a thing over which the jurisdiction is to be exercised is within the territorial power of the sovereign.³² This is universally admitted as to actions for the actual recovery of land or for the removal of a mortgage or hypothecation on the land. Some courts go so far as to include an action upon a contract for the conveyance of land. Such was the important and interesting decision of the Supreme Court of Spain in the case of *Anduce v. Piccioni*.³³ This was an action to invalidate a contract of sale of land in a Spanish island. The contract was made at the Danish island of St. Thomas, between two persons there domiciled. Suit was brought in St. Thomas and carried by appeal to the Supreme Court at Copenhagen, where it was held that the Danish court had jurisdiction, and judgment was given for the present defendant. The plaintiff brought suit in a Spanish court, which held that the Danish court had no jurisdiction, since the object of the suit was Spanish land, and reached a decision in entire disregard of the Danish judgment. The court said:

"Questions which affect the movement and the transmission of property should be determined on the principle *lex loci rei sitæ*; because otherwise it would be easy for a nation to cause harm to other nations in a branch of right so high and sacred as that of the dominion which all nations exercise in an absolute manner over their respective territories."

On the other hand, the Civil Tribunal of Nice has decided that a suit is not confined to the *forum rei sitæ* where the dispute is only with regard to the validity of a reciprocal obligation of the parties with relation to a thing.³⁴ The same decision has been reached by the Swiss Federal Tribunal in the case of an action arising out of a sale of personalty.³⁵

³¹ See *Digesto Italiano*, art. *Competenza Civile*, section 216; *Girard v. Tramantano*, Court of Naples, 1883, 12 *Clunet* 464, 1 *Beale*, Cases on the Conflict of Laws, 367.

³² *Bar*, International Law, § 418.

³³ *Revista General*, *Jurispr. Civil*, 28, 498, 1 *Clunet* 253.

³⁴ *De Boigne v. Gryniewitch*, 4 *Clunet* 422.

³⁵ *Re Brack*, 9 March 1877, 5 *Clunet* 68.

Varieties of jurisdiction *in rem* are the so-called provisory seizure of property, the settlement of succession upon death, etc.³⁶ On this ground also must be placed actions for arrestment, or, as we should say, garnishment of property. The right to make an arrestment of property is quite clear. This right has not always been exercised where there is no other ground of jurisdiction; in other words, it has sometimes been held that arrestment alone is not sufficient to found jurisdiction.³⁷ Generally speaking, however, the courts take jurisdiction in such cases whether the arrestment is an *ad interim* process or final process after a judgment.³⁸ In a case of this sort the court's jurisdiction is limited to its determination of the arrestment, and this determination must await the action of the proper court of the principal obligation. Though the court is incompetent in such a case to determine, as between strangers, the existence of the obligation, it is on the contrary competent to pass upon the legality of an attachment or of a levy of execution resulting from a garnishment made within its jurisdiction. It ought always to grant a continuance to the attaching creditor to enable him to prove his claim before a competent court, on penalty, in case of failure to do so, of nullity of the whole process.³⁹

The superiority of this procedure over our own garnishment process, where the principal defendant is absent from the jurisdiction, is at once evident. The jurisdiction is exercised over the thing garnished (whether it be a chattel or a debt) to the extent of holding it for the claimant until he can prove his claim in the ordinary way in the court of his debtor; but the existence of the claim must be proved where the defendant can meet it, and justice can be done. In such a case, under our procedure, a garnishment often results in a claimant being given payment of an alleged claim to the extent of the assets reached, although the claim is really groundless; the

³⁶ See Bar, International Law, §§ 420, 420 a.

³⁷ Imperial Ottoman Bank v. Richardson, Trib. Com. Marseilles, 19 June 1893, 21 Clunet 112; Einwold v. German West African Co., 5 Juta 86, 1 Beale, Cases on the Conflict of Laws, 423 (1887).

³⁸ Caracanda v. Caracanda, Trib. Civ. Marseilles, 11 July 1906, 34 Clunet 362; Vorster v. Bonnington Chemical Co., R. O. H. G. 28 June 1872, Entscheidungen des R. O. H. G. 7, 16, 1 Clunet 33; R. G. 25 Jan. 1881, Entscheidungen des R. G. Civ., 3, 381, 9 Clunet 342.

³⁹ See Todesco v. Dumont, Civ. Trib. Seine, 8 March 1890, 18 Clunet 559, 1 Beale, Cases on the Conflict of Laws, 434.

defendant being unable, by reason of expense of taking and transmitting evidence, or at least by the innate weakness of written as against oral testimony, successfully to dispute allegations of the claimant in the distant court.

(b) *Cause of action arising within the country.* It is now almost universally held in Europe that a foreigner may be sued in case of all obligations, whether delictual or contractual, made or performable within the state.⁴⁰ This jurisdiction is not destroyed by a denial on the part of the defendant of the existence of the contract.⁴¹ The Institute of International Law has urged that the suit should be brought in the court of the state whose law is applicable to the contract; but there is no such rule of law now recognized by the European states.⁴² In connection with this rule it is interesting to notice the attitude taken by the European courts on the question of where the contract goes into existence. While there is some difference of opinion, the prevailing view appears to support the opinion of Merlin,⁴³ that the contract is complete in the place where the notification of assent is received,⁴⁴ though there is good authority for the opposite view.⁴⁵

In a few states a distinction is made between contracts and torts, and it is held that suit cannot be brought at the *forum delicti*.⁴⁶

An interesting question remains to be considered: whether suit may be brought on this ground in cases where the defendant was not present to be served with process, or where at least no property of his was present which could be seized. Von Bar says: ⁴⁷

"Older common-law practice, in conformity with the law of Rome and with the canon law, required, as a condition of giving jurisdiction to the *forum contractus*, that the action should be served upon the defender within the territory of the *forum contractus*, or that the defender should

⁴⁰ See Bar, International Law, § 423. Belgium: Trib. Com. Bruges, 16 May 1890, 18 Clunet 272. France: Trib. Com. Nantes, 20 July 1910, 38 Clunet 887. Italy: Geneva, 15 Dec. 1893, 24 Clunet 412 (tort); Bologna, 10 Nov. 1905, 34 Clunet 846. Roumania: Court of Bucharest, 27 Clunet 1036.

⁴¹ Trib. Com. Nantes, 20 July 1910, 38 Clunet 887.

⁴² See Amsterdam, 31 Dec. 1908, 38 Clunet 1332.

⁴³ See Langdell, Cases on Contracts, 156.

⁴⁴ See Trib. Com. Bruges, 16 May 1890, 18 Clunet 272; Cassation, Florence, 2 Feb. 1883, 12 Clunet 456.

⁴⁵ Gautier v. Gughelminetti, Semaine Judiciaire (Geneva), [1894] 165.

⁴⁶ See a decision of the Tribunal of Commerce of Antwerp, 4 Sept. 1893, as to the Dutch law, 22 Clunet 429.

⁴⁷ Bar, International Law, § 424.

possess property within that jurisdiction. Thus, in most cases, it was impossible to appeal to the *forum contractus* in cases in which the defender was not there. The modern German theory takes the view that this condition is due to the circumstance that the Roman civil process knew nothing of citation by writing. Accordingly, the defender must necessarily be cited within the jurisdiction of the court, or else the only remedy available was that the pursuer should be entitled to a *missio in possessionem* of the property of the defender which happened to be within the jurisdiction. But now that citations may be given without any limit *per requisitionem*, that condition of jurisdiction is out of place. This modern theory is recognized in § 29 of the German Civilprozessordnung.

"I believe, however, that it would be right, in the interests of international jurisdiction, to adhere to that special condition as essential to the *forum contractus*. Would it accord with the principles of *bona fides* if the creditor should allow the debtor with his whole estate to leave the jurisdiction of the court in order to raise his action subsequently before a court where the defender would find it much more difficult to maintain his case? I believe not, and am all the more persuaded that it is not so, since a widely spread usage has retained that essential condition of jurisdiction in spite of the practice of written citation."

It is clear that this was the doctrine of the Roman law and of the canon law, and it seems to have been the practice of the Roman-Dutch law in Holland and its colonies.⁴⁸ Groenewegen⁴⁹ says:

"It also seemed to our ancestors unjust and contrary to all reason to put their sickle into the harvest of another jurisdiction on the ground of their country being the place of the wrong, the contracting, or the performance. Therefore to-day [about 1648] neither in Belgium nor in France may any one be sued in the place of his wrong, contracting, or performance unless he is found there. No doubt this is the cause of the arrest of debtors, than which nothing is commoner now."

But in spite of an occasional objection it is clear that to-day, not only in Belgium and France, but in Germany as well, as von Bar has shown, action may be brought without regard to the presence of the defendant.

(c) *Reciprocity*. This principle of jurisdiction was probably first invented by the compilers of the French civil code. According to its doctrine a court may exercise jurisdiction over a foreigner

⁴⁸ See *Einwold v. German West African Co.*, 5 Juta 86, 1 Beale, Cases on the Conflict of Laws, 423, 426 (1887).

⁴⁹ See Ad Cod. 3, 18.

wherever the courts of the foreigner would, under the same circumstances, have exercised jurisdiction over its citizens. On this principle jurisdiction is now exercised in probably all of the European countries.⁵⁰ The principle may result in the court declining a jurisdiction that it would otherwise exercise. So where it appeared that the Dutch courts exercised no jurisdiction over a foreigner in case of a tort committed in the country, a Belgian court declined to exercise jurisdiction over a Dutchman for a tort committed in Belgium.⁵¹ This was the ground of decision in an interesting case in Genoa.⁵² The obligations of an Italian company were issued by a Belgian bank. A holder of one of these obligations brought suit in Genoa against the Belgian bank and the Italian company jointly. The Italian court found that the Belgian law allowed a foreigner to be sued on an obligation when there were several defendants, one of whom was domiciled or resident in Belgium. The Italian court therefore held that suit could be brought by reciprocity in this case, but only if the Italian company was properly and not merely colorably joined as defendant.

Italian lawyers have accepted this doctrine of reciprocity with marked reluctance. In the *Digesto Italiano* the learned author of the article *Competenza Civile* discusses at length the true meaning of reciprocity. Prevailing jurisprudence interprets it according to the meaning generally accepted; that is, that suit may be brought wherever on similar facts suit might be brought in the other country. The author's own view, however, with that of a number of jurists, is that this right can be exercised only in case of treaty; otherwise, as they say, reciprocity means nothing better than retorsion. And in a case in the Court of Cassation of Turin⁵³ the court expressed at length its objection to the doctrine:

"The right of retorsion or of reprisal is not and cannot be a rational title or principle of law or of competence. It is allowed only to protect the citizen of one state against unjust treatment to which he may be subjected in another state. But it is now recognized that it is not fitted

⁵⁰ Austria: Supreme Court, 18 Sept. 1883, 15 Clunet 281. Belgium: 14 Clunet 359. Italy: P. Esperson in 10 Clunet 263. Switzerland: Geneva, 10 March 1894, *Semaine Judiciaire* [1894], 21 Clunet 1092; Geneva, 11 Jan. 1895, 22 Clunet 895.

⁵¹ Trib. Com. Antwerp, 4 Sept. 1893, 22 Clunet 429.

⁵² Court of Genoa, 16 Feb. 1885, 14 Clunet 669.

⁵³ 9 Dec. 1879, 8 Clunet 438.

to attain this object of protection. In fact it renders more bitter instead of soothing the sentiments of defiance, jealousy, or hostility in which nations have unhappily been brought up. This is why doctrine and jurisprudence to-day concur in restraining it within the most rigorous limits of necessity."

(d) *Counterclaim*. Wherever a foreign plaintiff is allowed to bring action in a country, it is obvious that he must also submit to any counterclaim made by the defendant, whether or not the defendant could originally have brought action there upon the demand which is the subject of the counterclaim.⁵⁴

(e) *Consent*. Jurisdiction by consent of the defendant is universally admitted. This consent may be manifested in either of three ways: by appearance in the suit, by agreement beforehand upon a court in which the suit is to be tried, or by election of domicile.

Where a defendant voluntarily appears in a suit he cannot afterwards object to the jurisdiction of the court, since by entering upon a defense on the merits he has accepted the jurisdiction of the court.⁵⁵

A special agreement that disputes arising upon a contract shall be settled within a certain court, it has been generally agreed, gives jurisdiction to that court.⁵⁶ The courts of Monaco alone have declared that it is contrary to public policy that they should be ousted of jurisdiction on such an agreement.⁵⁷ An express agreement upon a place of performance does not constitute such an agreement.⁵⁸

A special method of agreeing upon the competence of a foreign court is the election by the foreigner of a domicile within the foreign state for the purpose of suit. The election of such a domicile applies, it would seem, only in the matter in connection with which the election of domicile is made.⁵⁹ It has been held in Austria that

⁵⁴ See Laurent in 4 Clunet 505; Ghent, 22 May 1912, 39 Clunet 1236. See, however, Bar, International Law, p. 926.

⁵⁵ Trib. Klagenfurt (Austria), 17 Sept. 1899, 27 Clunet 174, Juristische Blätter, 1899, 455, No. 33; Court of Algiers, 23 May 1882, 10 Clunet 158.

⁵⁶ Trib. Civ. Seine, 10 Feb. 1886, 13 Clunet 324; Trib. Com. Marseilles, 17 Dec. 1894, 22 Clunet 591; R. G., 22 Feb. 1894, 26 Clunet 397.

⁵⁷ 26 Clunet 418, 31 Clunet 453.

⁵⁸ Court of Douai, 2 Dec. 1905, 34 Clunet 355.

⁵⁹ Trib. Com. Marseilles, 25 Feb. 1878, Jurisp. Com. et Marit. de Marseille, [1878] 49, 5 Clunet 372; Swiss Fed. Trib., 4 May 1888, 17 Clunet 511. See, however, Trib. Civ. Seine, 26 July 1879, 7 Clunet 100; French Cassation, 4 March 1885, 12 Clunet 445.

such election of domicile simply authorizes suit in the foreign country, and does not bar suit against the defendant at his own domicile.⁶⁰

(3) *Foreign Corporations.* It is generally held that a foreign corporation may be sued on the same principle as a foreign individual; but in the nature of the case greater difficulties must be experienced in working out the result.⁶¹ Where, however, the corporation has a place of business and an agent within the state, jurisdiction over it is probably universally exercised.⁶² A special difficulty arises with regard to the so-called *moral persons* which are in fact universal societies, as for instance the Church. This difficulty was felt in a case where the Superior General of the Congregation of the Ladies of the Sacred Heart brought a suit in Rome. The Court of Cassation of Rome finally held that the action would not lie. In the course of its opinion the court said:

"Moral persons created in one state have no existence beyond the frontiers of the state which has recognized and created them, and this for two reasons: first, because the sovereign power which is at once confined within the limits of its own territory cannot give to an artificial person a universal existence which it does not possess itself; second, because a moral person represents an idea which has its reason for existence and ought to serve a political, economic, and religious purpose which is necessarily national. Beyond the frontiers of the state where it has been created, this reason for existence and this object not only cease to exist, but may even be found in opposition to the established conditions of the local public law. The present court has already decided that a religious order, even if it presented such a character of universality as that of the Jesuits, could not be considered and treated from the point of view of the civil law as constituting a moral person. It could not be so regarded because there is neither a universal state nor a universal legislator which is capable of conferring this character of universality. As a result in everything which concerns the acquisition and possession of property the order of Jesuits is resolved into as many distinct legal personalities as there are states in which it is recognized."

⁶⁰ Supreme Court of Austria, 12 March 1890, 20 Clunet 214; and see Trib. Civ. Marseilles, 11 July 1906, 34 Clunet 362.

⁶¹ See Bar, International Law, p. 229.

⁶² See Cas. Turin, 29 Aug. 1911, 39 Clunet 591.

C. *The Law of France.*

The French law has had an independent development so far as it was affected by the provisions of the French civil code and by jurisprudence since its adoption. This code applied also to Belgium, and its provisions have been precisely adopted in Roumania; the law of those two countries therefore is the same as that of France, except so far as it has been modified by later legislation.

(1) *Right of a Foreigner to Sue.* Whether a foreigner may sue another foreigner in the French court has been much debated.⁶³ There is no express provision of the civil code limiting the right of a foreigner to stand in justice. Laurent says on this point:⁶⁴

"The civil code says nothing of litigation between foreigners. Should this silence be interpreted as meaning that the French courts are incompetent to decide disputes between foreigners? That is the doctrine adopted by French jurisprudence. It has been admitted that this only amounts to a denial of all justice. If such were the positive will of the legislator, it would be necessary to accept it; protesting, however, in the name of the public conscience, against a law which would permit a debtor to mock at his creditor. But we shall search vainly in our law for any provision which forbids a judge to entertain a suit between foreigners. The court of Brussels says that there is no text which forbids it. If no law forbids the French courts from deciding disputes between strangers, why, then, should they declare themselves incompetent?"

He then proceeds to consider reasons which have been given for denying jurisdiction, and concludes that they are "excessively weak." The decision of the court of Brussels referred to by Laurent is the case of *Lhullier v. Naintre*.⁶⁵ This was an action between two Frenchmen, growing out of a business done in Brussels. The court took jurisdiction on the ground that there was no provision of law to forbid it. Von Bar also⁶⁶ appears to find the rule denying access to the courts indefensible. The French law before the code had no

⁶³ For a thorough study of this particular question see "Jurisdiction in Actions between Foreigners" by Professor A. Pillet in 18 HARV. LAW REV. 325. In this article the history and philosophy of the doctrine is discussed. No attempt is here made to reëxamine the subjects there discussed.

⁶⁴ See *Droit Civil*, Vol. i, § 440.

⁶⁵ See *Pasicrisie Belge*, 1863, 2, 351.

⁶⁶ *Bar*, International Law, p. 883.

such interpretation. As then settled, a foreigner, to be sure, could not sue a native without giving surety for payment of judgment (*cautio judicatum solvi*). When, however, two foreigners sued each other the plaintiff need not give security unless the defendant, first offering security himself, demanded it.⁶⁷ So far as can be seen foreigners were entirely free to sue one another.

The French law was settled by the decision in the case of *Mount-Florence v. Skilpwith* in the Court of Cassation on the twenty-second day of January, 1806.⁶⁸ The defendant was the American consul at Paris, and the plaintiff was the chancellor of the consulate. They had made an agreement to share the emoluments of the consulate for a year. The plaintiff sued for his share of the emoluments in the Tribunal of First Instance, and recovered. The Court of Appeal of Paris, however, held the French courts incompetent, saying:

"According to the common law, and the very intention of the parties, such a suit can have no other judges than the representatives of the United States in France, and the courts of their nation."

The Court of Cassation upheld this decision, after a skilful argument in its favor by the great advocate Merlin; saying, that since the parties were foreigners, not domiciled in France, and the action was merely personal, and not growing out of an act of commerce, the maxim *actor sequitur forum rei* applied. Two earlier decisions were distinguished, on the ground that in them the parties had consented to the jurisdiction.

This doctrine has remained that of the French courts until the present day, although it has been severely attacked from time to time by writers within France as well as outside.

In certain cases it is agreed that a foreigner may sue another foreigner in France. From the first this has been allowed in case of consent of the parties.⁶⁹ Suit will also lie between foreigners in the Tribunal of Commerce, where the business done was in France.⁷⁰ In the Civil Tribunal suit may be brought, though the plaintiff has no authorized domicile, provided the parties have actually lived

⁶⁷ See Guyot, *Repertoire*, Art. *Étranger*.

⁶⁸ See Sirey 2, 1, 206.

⁶⁹ Algiers, 24 Dec. 1889, 18 Clunet 1171.

⁷⁰ Trib. Com. Seine, Oct. 18, 1890, 7 Clunet 587; Tunis, 2 March 1905, 33 Clunet 1116, Jour. Trib. Tunisie, 1906, 220.

and done business in France. In any suit growing out of such business the foreign residents may sue one another. In the case of *Vanguilbert v. Vandevière* in the Civil Tribunal of Lille⁷¹ suit was brought by one foreigner against another for goods sold. Both parties had been living in France for several years and, as the court said, might be considered "as having their domicile there, and as having reciprocally submitted themselves as to the execution of their obligation to the jurisdiction of the French courts." In the case of *Kowalski v. Mocaluvo*,⁷² an action for the rent of a piano, both parties were residents of France but not domiciled there. The tribunal gave the following opinion:

"In hiring a piano at the Hertz establishment, Mocaluvo has obviously elected at Paris a domicile for the execution of his contract, and has submitted to the jurisdiction of the French courts; especially since he cannot indicate a foreign domicile where he may be sued, alleging only that he was born in Sicily. . . .

"This firm [Hertz], and its successor Kowalski, did an act of commerce in letting and eventually selling a piano to Mocaluvo. France, in permitting foreigners to establish themselves within her territory and there to engage in commerce, assures them by implication her protection for the enforcement of contracts good by the law of nature made between them within her territory, while engaged in commerce. It would be otherwise if the suit concerned the personal status of foreigners and the application of the laws of their own countries."

Belgium has by legislation⁷³ brought her law on this point into accordance with the general common law of Europe, so that now a foreigner may sue on the same footing as a native.

(2) *Suit against a Foreigner.* The peculiar provisions of the French code for suing a foreigner are contained in section 14 of the civil code:

"The foreigner, even though not a resident of France, may be cited before the French tribunals, for the execution of obligations contracted in France, with a Frenchman; and may also be sued in the French tribunals upon obligations contracted by him abroad, with a Frenchman."

⁷¹ 12 Clunet 291 (1855), 1 Beale, Cases on the Conflict of Laws, 525.

⁷² Civ. Trib. Seine, 21 Jan. 1885, 12 Clunet 176, 1 Beale, Cases on the Conflict of Laws, 526.

⁷³ Law of March 25, 1876, Arts. 52-54; Pasinomie, 1876, 157.

This has been held to apply as well to quasi-contracts and delicts as to contracts.⁷⁴ From the last part of this section, in derogation as it was from the common law,⁷⁵ has resulted the doctrine peculiar to the French and Belgian courts that a citizen has a claim on his own court, so that he may resort to that for the decision of all his disputes no matter who the other party may be.

"The object of this provision, containing as it does an exception to the rule *actor sequitur forum rei*, is to assure to a Frenchman the benefit of the national courts. It follows *a fortiori* that a defendant cannot, contrary to the rules of the common law, be withdrawn from his natural judges. Foreign courts are therefore on principle incompetent as concerning him."⁷⁶

Such being the view of the French law, it must be obvious that if the same view is taken by the court of another state, and its jurisdiction is extended over all of its citizens, there is an insoluble conflict of jurisdiction, and neither court will recognize the acts of the other. And such is the case. In imitation of the French provisions, similar provisions have been inserted in the codes of procedure of a number of European states, and they have given judgment in their courts against Frenchmen. Such judgment the French courts will not recognize.⁷⁷ The phrase of the Court of Paris already quoted is conclusive on this matter; the Frenchman still retains his right to be sued in his own court. But if the French court will not recognize the foreign judgment, neither will the foreign court recognize the French judgment in such cases. So the Italian court has said⁷⁸ that Article 14 of the French civil code is

"contrary to the provisions of Art. 105, number 2, of the [Italian] code of civil procedure, submitting to Italian jurisdiction suits relative to obligations performable in Italy, or resulting from contracts made or acts done in the kingdom. It thus contains a usurpation of jurisdiction that belongs to the Italian courts. It sets up an extravagant claim of jurisdiction, contrary to the law of nations, and therefore not to be recognized in any state whose municipal public law it violates.

⁷⁴ See Poitiers, 8 Prairial an 13, Sirey 6, 2, 40.

⁷⁵ See F. Laurent in 4 Clunet 505.

⁷⁶ Court of Paris, Young *v.* Dreyfus, 12 Clunet 539, 1 Beale, Cases on the Conflict of Laws, 379 (1885).

⁷⁷ See Howe *v.* Bernheim, Trib. Com. Seine, 4 Feb. 1880, 7 Clunet 104.

⁷⁸ Girard *v.* Tramontano, Court of Naples, 1883, 12 Clunet 464, 1 Beale, Cases on the Conflict of Laws, 367.

"It is in vain to urge that a foreigner in contracting with a Frenchman, whenever he knows the provisions of Art. 14 of the Code Napoleon, is regarded as having waived the right of being judged by his natural judges. For the individual who cannot by his own will obtain within his own country other judges than those provided by the laws of the state cannot, *a fortiori*, escape the rules of competence established by public international law."

So in the English case of *Schibsby v. Westenholz*⁷⁹ Blackburn, J., refused to recognize the French judgment under similar circumstances.

But the difficulty with this provision is not limited to the fact that the judgment of one country based upon it will be disallowed in another. The foreign judgment will not be recognized as sound, and a Frenchman will not be barred by the foreign judgment even though he appears and litigates the matter in the foreign suit;⁸⁰ but, on the other hand, the foreigner, while he cannot rely upon his foreign judgment in the French court, is nevertheless held to be barred from proceeding on the original cause of action, because of his election to the foreign domicile, and he is thus left absolutely without remedy in France.⁸¹ The statesmen of the French Revolution professed to be governed by consideration for the rights of all mankind, and boasted that they were sweeping away the disabilities which, to the shame of the mediæval sovereigns, had been imposed upon foreigners; but they were in fact establishing disabilities and discriminations which other nations abhor.

Joseph Henry Beale.

HARVARD LAW SCHOOL.

[To be continued.]

⁷⁹ L. R. 6 Q. B. 155, 1 Beale, Cases on the Conflict of Laws, 328 (1870).

⁸⁰ See *Kharkoff Tramways v. Bonnet*, Pand. Belg. 1891, 116, 18 Clunet 591; *Lemaire v. Charrier*, Trib. Civ. Seine, 27 Fed. 1884, 11 Clunet 390.

⁸¹ See Trib. Com. Seine, 24 June 1893, 20 Clunet 1149.

STRIKING WORDS OUT OF A WILL.

IF a will as executed by the testator fails to express his true intentions by reason of a mistake without any fraud, how far can any court receive evidence of the mistake and afford a remedy. There are a number of English cases in which a court of probate has afforded a remedy to a limited extent. In America there is but little authority on the subject.

The questions arising in this class of cases may be stated as follows:

I. Has a court of equity power, in any case, to correct a mistake in a will?

II. Has a court of probate power, in any case, to correct a mistake in a will?

If a court of probate has such a power:

A. Can it, in any case, add words to the will?

B. Can it, in any case, reject words found in the will as it stood when executed?

If it has power to reject words:

(1) For what sort of mistake can it exercise such a power?

(2) To what extent, assuming the mistake to be of a sort on which the court can act, can it exercise such a power:

(a) Where the rejection would not increase the amount of property passing under any part of the will?

(b) Where it would increase the amount passing under some part of the will?

I.

Courts of equity have no power to rectify or reform wills, on account of mistake, similar to that exercised by those courts in the case of deeds.¹ So-called reformation or correction of mistakes

¹ Polsey v. Newton, 199 Mass. 450, 85 N. E. 574 (1908); Nelson v. McDonald, 61 Hun (N. Y.) 406, 16 N. Y. Supp. 273 (1891); Sherwood v. Sherwood, 45 Wis. 357 (1878). See *In re Bywater*, 18 Ch. D. 17, 22 (1878). There are a couple of American cases which seem *contra*. but they are of doubtful import on this point,

in wills, without the aid of extrinsic evidence of intention, by disregarding or implying terms, is an entirely different process, being purely a matter of construction;² nor has a court of equity greater power in that respect than a court of law.

The reason usually given why equity will not reform a will is that the statute prescribing certain formalities for wills forbids the admission of extrinsic evidence of intention. The Statute of Frauds, however, has not prevented the reformation of deeds and contracts on account of mistake, although courts are not agreed upon the grounds and extent of such reformation.³ Perhaps the requirement of attestation makes it more difficult to give effect to extrinsic evidence of intention, even by way of reformation in equity.

Another reason frequently given is that the beneficiaries under a will are volunteers, and equity will not interfere in favor of a volunteer.⁴ How far this objection is conclusive may be doubted. It seems that voluntary deeds may be reformed in equity, as between volunteers claiming under them.⁵ But it was formerly considered doubtful whether equity could reform a voluntary deed, even in favor of the donor.⁶ And it is still sometimes said broadly in modern cases that equity will not reform any deed in favor of a volunteer.⁷ Certainly there are few cases where it has been done, even as against another volunteer. Historically, at any rate, the lack of consideration has been a principal reason why equity has declined to interfere in the case of wills.⁸

and both were uncontested: *Wood v. White*, 32 Me. 340 (1850) (disapproved in *Sherwood v. Sherwood*, 45 Wis. 357 (1878)), and *Worrell v. Patten*, 69 Ill. 254 (1873). It is suggested by the writer of a note in 21 HARV. L. REV. 434 that equity might afford a remedy in cases of mistake, but he cites no authority. See also Stephen, *Digest of Evidence*, preface to 3 ed., p. xxxviii.

² Story, *Equity Jurisprudence*, § 179.

³ See Fry on Specific Performance, 5 ed., §§ 813 *et seq.*; Wigmore on Evidence, § 2417.

⁴ *Powell v. Mouchet*, 6 Mad. 216 (1821); *Engelthaler v. Engelthaler*, 196 Ill. 230, 63 N. E. 669 (1902); *Sherwood v. Sherwood*, 45 Wis. 357 (1878); Wigram on Wills, ed. O'Hara, p. 266.

⁵ *Thompson v. Whitmore*, 1 J. & H. 268 (1860); *Newburgh v. Newburgh*, 5 Mad. 364, 366 (1820); *Lister v. Hodgson*, L. R. 4 Eq. 30, 34 (1867); *Adair v. McDonald*, 42 Ga. 506 (1871).

⁶ See remarks of Kekewich, J., in *Bonhote v. Henderson*, L. R. [1895] 1 Ch. 742 (1894).

⁷ *Shears v. Westover*, 110 Mich. 505, 68 N. W. 266 (1896).

⁸ Sometimes the objection is taken that the court cannot make the testator exe-

There is something to be said for always having a will proved as it stood when executed, and leaving a court of equity to deal with a mistake by making the beneficiaries who have profited thereby constructive trustees of what they have received.⁹ But the law has not in fact proceeded in this way. The only instances in which any court has attempted to remedy mistakes in wills are those where a probate court has omitted particular words as not being part of the will, upon the theory stated below.

If words inserted by mistake are to be allowed to remain in the probate, and a remedy afforded by a court of equity, it seems that where words have been inserted by fraud the procedure should be the same. It is settled, however, that in the latter case the words should be omitted in the probate, and that if they are not so omitted, equity can afford no remedy.¹⁰ It is true that in a case of fraud where justice cannot be done by omitting words from the probate, as when the fraud consisted in procuring the omission of words from the will, equity does afford a remedy by holding the legatees as constructive trustees. By analogy, there might be a remedy in equity in a case of mistake, supplemental to that in the probate court. But there is no authority for the interference of equity in any case of mistake only.¹¹

cute a new will (*Rhodes v. Rhodes*, 7 App. Cas. 192, 198 (1882), quoted below). But a court can reform a deed or contract as against the heirs or executors of a party, after his death. The fact, however, that in the case of transactions *inter vivos* the parties are usually alive when the occasion for reformation arises, while in the case of a will the testator is of course always deceased, tends, among other considerations, to show that the danger of admitting extrinsic evidence of mistake as a basis for reformation in equity would be much greater in the case of wills.

⁹ See note in 21 HARV. L. REV. 434, above referred to. The jurisdiction of a court of equity to reform contracts is exercised upon broader grounds, and for more varied sorts of mistake (*e. g.*, a mistake of fact as to the subject of the instrument), than the jurisdiction of a probate court to correct wills. The suggestion apparently is that equity should afford a remedy for mistakes in wills on similarly broad grounds.

¹⁰ *Allen v. M'Pherson*, 1 H. L. Cas. 191 (1847); *Case of Broderick's Will*, 21 Wall. (U. S.) 503, 512 (1874); *Post v. Mason*, 91 N. Y. 539, 550 (1883).

¹¹ But see a *dictum* in *Whitlock v. Wardlaw*, 7 Rich. Law (S. C.) 453, 458 (1854). There is not so strong a ground for the interference of equity in the case of a mistake where the only cause of the defeat of the testator's intention is his own failure to insert words which he intended to use, as there is in the case of a fraud, where the wrongful act of another person intervenes as the efficient cause of the omission and gives equity a hold upon the wrongdoer.

II.

Has a court of probate¹² power, in any case, to correct a mistake in a will?

The business of such a court is to determine what instrument, in just what words, constitutes the testator's will. It must therefore correct mistakes, if at all, by adding words to the will, or taking words from it.

A. Can it, in any case, add words to the will?

The law is clear that it cannot do so, no matter how evident it may be that words necessary to carry out the testator's intent have been omitted, and no matter what the cause of the omission. The court cannot make a will for the testator. Only such words as are contained in an instrument properly executed by him can be a part of his will. If a court of equity cannot reform his will by adding words to it, much less can a court of probate do so, which is a court of law, whose office is to determine what instrument, if any, the deceased executed as his will. It is immaterial whether words were omitted by mistake or on account of fraud.¹³

This proposition is frequently stated in the form of a rule of evidence. But it is not properly a rule as to the admissibility of evidence of the testator's intention; it is a substantive rule of law making it impossible to give effect to his intention, except as expressed in a properly executed instrument.¹⁴

B. Can a court of probate, in any case, reject words found in the will as it stood when executed?

¹² By "court of probate" must be understood not only courts usually so designated, or having as a principal function the probate of wills, but any court which passes on the *factum* of a will, as the common-law and chancery courts regularly did, in the case of a will of real estate, in England until 1857, in many of our states until a more recent date, and even to-day to some extent in certain jurisdictions.

¹³ A couple of English cases where words were inserted by a probate court have been expressly overruled. *Goods of Schott*, [1901] P. 190.

Professor Wigmore apparently thinks that the courts might have inserted words which were omitted by mistake. *Wigmore, Evidence*, § 2421, n. 1. He does not state his theory on this point, but it may be similar to that stated by him in discussing the reformation of contracts in writing, § 2417. Query, whether such a theory is applicable to instruments which are required to be attested?

¹⁴ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 117 (1866); *Thayer, Preliminary Treatise on Evidence*, 396, 397.

According to a number of English cases¹⁵ it has power to do so, in certain instances, on the ground that such words were inserted by mistake. It is believed that in no reported American case has such a power been exercised;¹⁶ but that, on the other hand, in no reported case has a state of facts similar to those on which the English courts have acted been squarely presented.¹⁷ Can this practice of the English courts be justified in theory? The cases in which it has been established do not contain a full discussion of the grounds for it. Recourse must be had to the fundamental principles that should guide a probate court in dealing with a paper which has been shown to have been executed in the manner required for a will.

The leading case of *Guardhouse v. Blackburn*¹⁸ lays down six rules, some of which it is desirable to consider in detail.

"*First.* That before a paper [duly] executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it."

That the testator must "know and approve" the contents of the will is the old established phrase.¹⁹ Nevertheless it needs considerable explanation. The real question is, are the words of the will the testator's words? He may make them his own without actually knowing what they are.

If the testator executes, without reading, a will which has been drawn up from his instructions, he does not in fact know its contents, in the sense of the words written in it as distinguished from their purport or effect. And it is with this sense of the term "contents" that we are here concerned.

¹⁵ *Goods of Duane*, 2 Sw. & Tr. 590 (1862); *Goods of Oswald*, L. R. 3 P. & D. 162 (1874); *Morrell v. Morrell*, L. R. 7 P. D. 68 (1882), and other cases cited below.

¹⁶ In *O'Connell v. Dow*, 182 Mass. 541, 552, 554, 66 N. E. 788 (1903), and *Sherwood v. Sherwood*, 45 Wis. 357 (1878), there are *dicta* in favor of such a power.

¹⁷ Why is it that cases involving points of law on the execution of wills are much rarer in this country than in England? Is it because cases in the probate courts are in most of our states not reported? Or because the practice of having an elaborate will drawn by an attorney from instructions, and executed without the testator's reading it, is more common in England?

¹⁸ L. R. 1 P. & D. 109, 116 (1866).

¹⁹ *Barry v. Butlin*, 2 Moo. P. C. 480 (1838); *Hastilow v. Stobie*, L. R. 1 P. & D. 64 (1865); *Goods of Hunt*, L. R. 3 P. & D. 250 (1875); *Swett v. Boardman*, 1 Mass. 257 (1804).

Courts have sometimes expressed themselves as if knowledge of the contents meant knowledge of the general purport of the will.²⁰ But it seems that the testator must either know or in some manner adopt the particular words written. It is with these words that a court of probate is concerned, and not with their meaning or legal effect. If a testator instructs his attorney to insert in his will a gift in certain terms, without leaving any discretion to the attorney, but the latter substitutes other words because he thinks they better carry out the testator's intentions, and the testator executes the will supposing that the gift has been written in terms as directed by him, the words used contrary to instructions are not a part of his will; and this is so without regard to the question whether the words used do in truth better express the testator's intentions, or what probably would have been his intentions if the matter had been explained to him.²¹

The intention of the testator as to how his property shall go is not, strictly speaking, the concern of a probate court.²² Such a court cannot consider the legal effect of his words, or his belief as to their legal effect. Its only business is to determine the contents of his last will and testament, in the sense of the words contained in it.²³ It is, therefore, the contents of the will in that sense, *i. e.*, the words contained in it, that the testator must know and approve. Whether he does or does not know and approve of their legal effect is immaterial. But in what manner he must know and approve the words in order to make them his own is the question.

The testator, then, in the supposed case where he executes, without reading, a will drawn up in accordance with his instructions,

²⁰ *E. g.*, in *Hastilow v. Stobie*, L. R. 1 P. & D. 64 (1865), discussed below.

²¹ See *Farrelly v. Corrigan*, [1899] A. C. 563, and *Parker v. Felgate*, L. R. 8 P. D. 171, 174 (1883).

²² "It was not for them [the jury] to inquire into the meaning which he attached to particular clauses or provisions in it [the will] unless they should be of opinion that he had been misled or deceived." Charge to jury in *Davis v. Davis*, 123 Mass. 590, 597 (1878).

²³ *Harter v. Harter*, 3 P. & D. 11, 21 (1873); *Rhodes v. Rhodes*, 7 App. Cas. 192, 199 (1882); *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335. See also *Hegarty's Appeal*, 75 Pa. St. 503 (1874); *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055 (1890). In *Burger v. Hill*, 1 Bradf. Surr. (N. Y.) 360 (1850), a probate court undertook to remedy a mistake of law as to the scope of words in a will, by limiting the grant of probate, so that those words in the will should not take effect as to certain property. The decree, although affirmed in *Hill v. Burger*, 10 How. Pr. (N. Y.) 264 (1854), was unprecedented and unjustifiable.

adopts the contents as his will, and approves them as such, but he does not know them except constructively and by a fiction.

It seems, moreover, that it is not necessary that the testator should know even the general purport of his will, if he chooses to execute a testament that some one else has made for him "out of the whole cloth."

In *Hastilow v. Stobie*²⁴ the defendant pleaded that the deceased, at the time he signed the pretended will, did not know and approve the contents thereof. The plaintiff demurred to the plea, as bad in substance, on the ground that a will may be valid although the testator did not know and approve the contents thereof. Sir J. P. Wilde (afterwards Lord Penzance) held the plea good. He discussed the question whether, if a man chose to entrust the framing of his will entirely to another person, and executed it without at all knowing its contents, the will would be valid; and expressed the opinion that it would not, disapproving of the expressions of Sir C. Cresswell in favor of its validity in *Middlehurst v. Johnson*²⁵ and *Cunliffe v. Cross*.²⁶ For this his principal reasons were: first, that a will must of its nature be an expression of the testator's own volition;²⁷ second, that if such a will were good, it would be absurd to require that the testator have sufficient mental capacity to understand the disposition which he is making.

The first reason seems to resolve itself largely into a quibble on the double meaning of the word "will."²⁸ It is not necessary that a will should be the expression of the maker's volition in any different sense from that in which a deed must be so. If he deliberately executes an instrument which some one else has drawn up, that instrument is an expression of his volition. It is true that a testator

²⁴ L. R. 1 P. & D. 64 (1865); S. C. 35 L. J. P. 18; 11 Jur. N. S. 1039; 14 W. R. 211.

²⁵ 30 L. J. P. 14 (1860).

²⁶ 3 Sw. & Tr. 37 (1863).

²⁷ Civil law authorities were cited in argument and relied on by the court, and also a passage from Swinburne on Wills, Part 1, § 3, par. 34. But an examination of Part 4, § 11, of the same work, where Swinburne repeats this statement (par. 11) among other rules as to validity of wills, is sufficient to show that he is here quoting directly from the civil law, and that the civil law is of little value as a guide to English testamentary law on such a point. The notion of one man's acting for another had only a limited currency in the Roman law. Sohm, Institutes of Roman Law, § 32 (Ledlie's translation, p. 145); Pollock, Contracts, 8 ed., p. 55; Dig. 28, 5, 32, pr.; Dig. 44, 7, 11.

²⁸ Justinian's Institutes likewise make a pun on "*testamentum*," as if it were derived from "*testatio mentis*." Inst. 2, 10, pr.; quoted by Sir J. P. Wilde, *supra*.

cannot execute his will by attorney.²⁹ The will, in that sense, must be his own act. But to delegate the choice of the words to be contained in the instrument is not the same thing as to delegate the function of executing it.³⁰ A will is often unquestionably good, though executed without the testator's having read it, or actually knowing one word which it contains, if drawn up by an attorney from the most general and informal instructions.³¹ In such a case the testator does not actually know its contents. He may know its general purport, as distinguished from the language in which the attorney has embodied that purport. But why is even knowledge of that general purport essential?³²

Just how much must the testator know about the contents of the will he signs? If he says to his attorney, "Tie up the property for my children," and the attorney, in a *bonâ fide* endeavor to carry out those instructions, draws a long document containing the most elaborate provisions, it is all his will.³³ Is there any difference except in degree when the testator says, "Draw up such a will as you consider suitable for me, and I will sign it"?³⁴

As to the court's second reason, based on the requirement as to mental capacity, it is not true that the testator must, at the time of execution, have the mental capacity to understand all the provisions of his will. If he has sufficient capacity to know he is sign-

²⁹ This results from the express provisions of the Statute of Frauds, allowing only signature by a person acting in the testator's presence, who is rather a mere amanuensis than an attorney. It appears, indeed, to have been also the law in the ecclesiastical courts previous to the Wills Act.

³⁰ Previous to the Statute of Frauds a will of personalty might be made by an oral declaration, and it may have been good law that a testator could not empower another to make such a declaration for him. But where the testator signs a written instrument, there is a sufficient making of the will by the testator himself.

³¹ Cf. *Sheer v. Sheer*, 159 Ill. 591, 596, 43 N. E. 334 (1893).

³² See *Williams on Executors*, 10 ed., 254, note (e), preferring the view of Sir C. Cresswell to that of Sir J. P. Wilde.

³³ But cf. *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289 (1907), where the instructions were wilfully exceeded.

³⁴ There seems to be no objection to a testator's making a part of his will by reference any existing document, whether or not he knows its contents. The document need not be one made by the testator. Lord Loughborough, in *Habergham v. Vincent*, 2 Ves. Jr. 204, 209 (1793); *Jarman*, 6 ed., 135. If he can do so, he can take a will prepared by another person, and by writing on it "This is my will," signing it, and having it witnessed, he makes a good will. There is no substantial difference between doing this and simply executing such a will.

ing a will drawn from his previous instructions, that is sufficient.³⁵ It is only necessary, as in the case of any other legal act, that the testator should be capable of understanding what it is that he is doing.³⁶

The word "know," as used in the phrase under discussion, does not then, in itself, help much in determining exactly the necessary conditions for the validity of a will.

On the other hand, a person who actually knows the contents of a paper, and duly executes it, must usually approve its contents. Whether fraud or coercion, not involving the introduction of matter into the will without the testator's knowledge, is to be considered as negating approval, seems to depend on whether they are treated as affording negative or affirmative defenses.

If the former view is taken, as in some states,³⁷ then these defenses may be held to negative the element of approval, which is thus treated as a necessary element in the proponent's case additional to that of knowledge. This was perhaps the view taken by the ecclesiastical courts, in which the phrase originated, so far as they paid any attention to such questions of pleading or of the separation of issues. In testamentary causes, at least, there was apparently no distinction made in those courts between affirmative and negative pleas or between different pleas in the same cause.³⁸ Likewise in issues at law as to the validity of wills of

³⁵ *Parker v. Felgate*, L. R. 8 P. D. 171 (1883); *Perera v. Perera*, [1901] A. C. 354, 361.

³⁶ The decision that the plea was good is sustainable on the ground that the words "know and approve" have an established technical meaning, which includes cases where the testator's knowledge of the contents is not actual but imputed. In *Cleare v. Cleare*, 1 P. & D. 655 (1869), Lord Penzance cites *Hastilow v. Stobie* as standing for the proposition that "if a man were to sign a paper of the contents of which he knew nothing, it would be no will." But does he know nothing of the contents when he knows it has been prepared by the attorney as he requested that it should be, *i. e.*, in accordance with what the attorney thinks proper? It may well be that the court would imply in such a request an instruction that the attorney should make the will such as he in good faith thought proper with regard to the testator's circumstances, and would find that the testator did not intend to adopt provisions inserted for the attorney's own benefit, or for reasons not connected with the testator's situation.

³⁷ *Sheehan v. Kearney*, 82 Miss. 688, 21 So. 41 (1896), and cases cited.

³⁸ *Hastilow v. Stobie*, L. R. 1 P. & D. 64, 66 (1865). The statement in *Langdell, Equity Pleading*, § 26, with regard to affirmative defenses in the ecclesiastical courts does not apply to the actual practice in the nineteenth century, at least in testamentary causes. It would be difficult to determine how far the loose state of the practice in testamentary causes, on this and other points, was due to the looseness of

real estate under the Statute of Frauds, any objection to the validity of a devise might be raised under the general issue.³⁹ It may be observed that according to this view the word "approve," in the phrase "know and approve," is used in an artificial sense, since in many cases of fraud there is approval in its ordinary sense.

If the defense is treated as affirmative, as in perhaps most states,⁴⁰ then the term "approval," in the definition of the requirements for the proponent's case, seems to be redundant, unless it is used to cover the cases where the words written are adopted without actual knowledge.⁴¹ From this point of view a better phrasing of the requirement would be "knowledge *or* approval."

"*Secondly.* That except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents."

Undoubtedly this rule applies in the ordinary case. The important part is the exception. Must the suspicion be of fraud, or is any evidence tending to show that the testator did not know and approve the contents sufficient to raise the suspicion? Does the rule state anything more than a *primâ facie* presumption?

It seems to be generally admitted that if a testator sign a document whose contents are entirely different from what he supposes them to be, it cannot be probated, although he intended to execute his will. As where he signs a draft of some one else's will, supposing it to be his own.⁴²

pleading in all causes in those courts in modern times, and how far to the doctrine that all proceedings in testamentary causes were *in rem*, which prevailed among the Canonists. Bernardus Dorna, *Summa Libellorum*, § 25; Wahrmund, *Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter*, I, 27. (The writer is indebted to Professor Roscoe Pound for these citations.) The testamentary action in Roman law (*hereditatis petitio*) was *in rem*. Sohm, § 39 (Ledlie's translation, p. 186). This doctrine is mentioned by some English writers on ecclesiastical law. *Law's Forms of Ecclesiastical Law*, 2 ed., 180; Browne, *Ecclesiastical Law*, 2 ed., 427, 452.

³⁹ *Hastilow v. Stobie*, *ubi supra*. See also *Guillamore v. O'Grady*, 2 J. & L. 210 (1845); *Trimlestown v. D'Alton*, 1 Dow. & Cl. 85 (1827).

⁴⁰ *E. g.*, *Baldwin v. Parker*, 99 Mass. 79 (1868); and *semble*, now in England, see *Hutley v. Grimstone*, L. R. 5 P. D. 24 (1879), and note.

⁴¹ See *Morrell v. Morrell*, L. R. 7 P. D. 68, 73 (1882).

⁴² *Goods of Hunt*, L. R. 3 P. & D. 250 (1875); *Estate of Meyer*, [1908] P. 353; *Goods of —*, 14 Jur. 402 (1850); *Alter's Appeal*, 67 Pa. 341 (1871); *Nelson v.*

The third, fourth, and fifth rules are not concerned directly with our question.⁴³

"*Sixthly*. That the above rules apply equally to a portion of the will as to the whole."

Whether this is true of the first rule (that the testator must know the contents) is perhaps the crucial point of the present inquiry. Assuming that, if a man executes as his will a document whose contents are entirely different from what he supposes them to be, the document is not entitled to probate; can the court refuse probate to particular words in an instrument of whose nature and general purport, and of a part of whose contents, the testator was aware? Or must the court treat the instrument actually executed as indivisible, and hold that every word, or none, is a part of a legally constituted will?

In cases of fraud or undue influence, the courts have struck out part of a will. And this has been done where the fraud has consisted in causing the testator to execute a will containing words which he did not know were in it, *i. e.*, where the proponent has failed to prove his case under the first rule in *Guardhouse v. Blackburn*, so that the contestant has not had to prove fraud as a

McDonald, 61 Hun (N. Y.) 406 (1890). See also *Downhall v. Catesby*, Moore 356 (1594); *Goods of Fairburn*, 4 Notes of Cas. 478 (1846); *Couch v. Eastham*, 27 W. Va. 796, 799, 805 (1886); *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289 (1907). The mistake on account of which a will is refused probate must be of the same sort as that for which a clause may be omitted. See II, B, (1) below.

⁴³ These rules are as follows:

"Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."

In the fifth rule, if "duly read over" means "read over in such a way that its contents are brought to the testator's notice," the court seems to state, in the form of a rule of evidence, the proposition that if a testator executes as his will an instrument whose contents he knows, it is immaterial whether or not he intends its legal effect.

defense.⁴⁴ In such cases the sixth rule has been applied to cases arising under the first.

Nor does there appear to be any solid objection to applying it where the testator's ignorance of a portion of the contents arises from mistake only. If the testator did not intend certain words written on the paper to be part of his will, because he did not know they were there, the law should not give effect to them as a part of his will. If, on the other hand, a man voluntarily puts into a document certain words, the law must give effect to them as they stand, without adding or subtracting anything on account of his extrinsic declarations. But the inquiry is always open whether he did intentionally use those words.⁴⁵ The statute requiring certain formalities for wills does not prevent the courts from declaring particular words in a formally executed instrument not to be a part of a testator's will, but only from declaring any words not contained in such an instrument to be a part of his will.

"The execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone."⁴⁶

The objection to the admission of evidence of such a mistake is one of policy, grounded on the danger of abuse. Undoubtedly, there is a presumption in favor of the document as it stood when executed. The requirements of policy seem to be satisfied by treating it as a *primâ facie* presumption.

It is evident from the foregoing discussion that although a court of probate may have power to reject words which were in the will when it was executed, on the ground that such words were inserted by mistake, that power is restricted to cases where the mistake is of a certain kind.

(1) For what sort of mistake can it exercise such a power?

If a testator knows the contents of the paper executed by him, it is immaterial that he labors under a mistake as to matters that

⁴⁴ *Fulton v. Andrew*, L. R. 7 H. L. 448 (1875); *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788 (1903).

⁴⁵ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 114 (1866). The knowledge of his attorney may be imputed to him in many instances, but that does not cover all cases where the testator is actually ignorant of the words used.

⁴⁶ Lord Blackburn, in *Rhodes v. Rhodes*, 7 App. Cas. 192, 198 (1882).

induce him to make such a disposition,⁴⁷ or that owing to a mistake as to the law, or as to the effect of his words, the document will fail to accomplish the result intended. It is only when he does not know the contents of the paper which he is executing that a mistake occurs which may be remediable.⁴⁸

But when does he, in the eye of the law, know the contents? Very often, as is pointed out above, he is held to do so when in fact he does not know them at all. Where a testator has read a will so that he actually knows its contents, there is no room for the application of the doctrine in question. On the other hand, if a copyist by a clerical error inserts words which were not in the draft, and the testator neglects to read the paper before executing it, there is a clear case for rejection of the words. The testator does not know of their presence, nor has he adopted them.⁴⁹ The result should be the same if such a clerical error is committed by the testator himself, as, for instance, in writing out a will on a printed form which he executes without reading over.⁵⁰

The difficult questions arise when a testator executes, without reading, a will that has been prepared by some one else from his instructions. Here the testator does not actually know the contents of the paper, but in most cases it is none the less his will that it fails, through some mistake, to carry out his intentions. He is held to know its contents, because he adopts his attorney's words as his own. The point then is, what sort of a mistake, on the part of the person actually responsible for the contents of the instrument, will justify the court in holding that the testator has not adopted the contents?

⁴⁷ Unless a statute makes a particular sort of mistake a ground for avoiding the will. Georgia Code, 1911, § 3836.

⁴⁸ The cases of *Goods of Gordon*, [1892] P. 228, *Goods of Reade*, [1902] P. 75, and *Goods of Snowden*, 75 L. T. R. N. S. 279 (1896), in which the court omitted a mistaken reference to previous instruments, appear to be wrong, if the testator was in each case aware of the presence of the words which it was sought to omit; and there is nothing to show the contrary. Whether such a reference could be disregarded in construction is another question.

⁴⁹ In the following cases such errors of insertion were corrected by the court: *Goods of Duane*, 2 Sw. & Tr. 590 (1862); *Vaughan v. Clerk*, 87 L. T. R. N. S. 144 (1902). Perhaps this last was rather a case of substitution. Other cases of errors of substitution are mentioned later, *e. g.*, *Goods of Bushell*, L. R. 13 P. D. 7 (1887). And see *Anonymous*, Godb. 131, pl. 149 (1587).

⁵⁰ *Goods of Moore*, [1892] P. 378.

Probably a testator can, if he wishes to do so, adopt whatever words his attorney, or any person entrusted with the preparation of the will, may have written.⁵¹ But usually a testator, in fact, only adopts the words written, upon the supposition that such person has carried out his instructions.⁵² Here again, however, it is immaterial that, through a mistake as to the law or as to the effect of words, the will as drawn by the attorney fails to carry out the testator's intentions. The attorney, in a sense, has not carried out the instructions. But the attorney's mistake, made in the course of attempting, in good faith, to carry out the testator's instructions, is in effect the same as the testator's mistake. It makes no difference whether the testator is aware of the language of the will or not. The mistake is as much his own in the eye of the law, in one case as in the other.⁵³ Any other rule would permit too wide an inquiry into the correspondence of the legal effect of the will with the testator's intentions.

The most doubtful cases occur where the attorney deliberately employs words which fail to carry out the testator's intentions, not because of any mistake as to the effect of such words, but because he misunderstands the instructions, or is in error as to facts which he assumes.

In *Brisco v. Hamilton*⁵⁴ a testatrix instructed her attorney that certain land was to be devised in a certain way. The attorney, supposing that the testatrix owned only a half interest in that land, wrote a devise of a half interest; and the testatrix executed the will without reading it. She in fact owned the whole interest in the land. It was held that the testatrix did not adopt the attorney's words; and the words "undivided moiety of and in" were rejected.

In *Morrell v. Morrell*⁵⁵ the testator gave directions for a bequest to his nephews of his shares in the M. Company. The lawyer wrote a bequest of "the forty shares in the M. Company," and the testator executed the will without reading it. He had four hundred shares, all of which he intended his nephews to have. A jury

⁵¹ *Cunliffe v. Cross*, 3 Sw. & Tr. 37 (1863); *Hastilow v. Stobie*, L. R. 1 P. & D. 64 (1865), *contra*, but see above.

⁵² See the instructions to the jury and the verdict in *Morrell v. Morrell*, L. R. 7 P. D. 68 (1882).

⁵³ *Rhodes v. Rhodes*, 7 App. Cas. 192 (1882); *Morrell v. Morrell*, L. R. 7 P. D. 68, 71 (1882); *Beamish v. Beamish*, [1894] 1 Ir. 7.

⁵⁴ [1902] P. 234.

⁵⁵ L. R. 7 P. D. 68 (1882).

found that the mistake occurred in inserting the word "forty"; and "that he did not approve of the word being used, *i. e.*, that he instructed his solicitor as to the whole of the shares, and only approved of the draft on the supposition that the solicitor had carried out his wishes." The court directed the word "forty" to be struck out.⁵⁶

In *Goods of Oswald*⁵⁷ the testatrix gave instructions for a testamentary instrument disposing of particular property. The attorney, apparently because he did not know that there was other property which had already been the subject of a previous will, drew up a will disposing of the particular property and containing the usual clause of revocation of all previous wills.⁵⁸ The testatrix executed the instrument, not knowing that it contained the clause of revocation. The court struck out that clause. Here the attorney misunderstood the instructions, or acted under a mistake as to the existence of a previous will.⁵⁹

In these cases not only did the words fail to carry out the testator's real intentions, but they were not used by the attorney for that purpose, but for the purpose of carrying out what he mistakenly supposed the real intentions to be. The break in the machinery for carrying out the testator's intentions occurred between the testator and his attorney.

The distinction is illustrated by the case of *Collins v. Elstone*.⁶⁰ There a clause of revocation was inserted in a testamentary in-

⁵⁶ It is not clear how the mistake arose here; it looks like a clerical error in writing "forty" for "four hundred," but the jury did not adopt that view. If it was due to a mistaken belief of the solicitor that the testator had only forty shares, the case is similar to *Brisco v. Hamilton*.

⁵⁷ L. R. 3 P. & D. 162 (1874).

⁵⁸ Or the clause of revocation may have crept in by a mere clerical error.

⁵⁹ In *Goods of Fairburn*, 4 Notes of Cas. 478 (1846), a *bonâ fide* misunderstanding of instructions affected the whole of the codicil rejected. In *Hippesley v. Homer*, T. & R. 48 n. (1822) (why did Lord Eldon say this case was not worth twopence? Sugden, *Law of Property*, 197), and *Goods of Wray*, Ir. R. 10 Eq. 266 (1876), parts of wills were rejected because not according to instructions, apparently on account of the attorney's misunderstanding or disregarding the instructions, without fraud. In *Farrelly v. Corrigan*, [1899] A. C. 563, there was either fraud or a wilful disregard of instructions, — it made no difference which. See *Christman v. Roesch*, 132 N. Y. App. Div. 22 (1909); *Wait v. Frisbie*, 45 Minn. 361, 47 N. W. 1069 (1891); *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289 (1907); and *dictum* in *Cowan v. Shaver*, 197 Mo. 203, 213, 95 S. W. 200, 203 (1906), which seems, however, to be too broad.

⁶⁰ [1893] P. 1.

strument, which had the unintended effect of revoking a previous will. The testatrix, however, knew of the presence of the clause, and deliberately allowed it to remain, on account of a strange belief, on the part of the testatrix and the person who drew the instrument, that such words would not revoke the previous will. The court declined to reject the clause. It seems, moreover, that even if she had not read the instrument, the result would have been the same; for the person who drew it knew that she did not wish the previous will revoked, and inserted the words, not in order to work a revocation, but because he supposed them to be a necessary form.

(2) To what extent, assuming the mistake to be of a sort on which the court can act, can it exercise such a power?

This question may require to be treated somewhat differently accordingly as the rejection of the words would or would not increase the amount of property passing under the remaining words. Such a distinction is commonly taken, and must be considered. Is there, then, any objection to the exercise of the power in a proper case of mistake, —

(a) Where the rejection would not increase the amount of property passing under any part of the will?

Suppose that by a clerical error words are inserted constituting a residuary legacy.⁶¹ There is no difficulty in omitting them, if the probate court has power in any case to reject words which were in the will when executed. The omission does not increase the amount passing under any part of the will, or alter in any way the effect of the remaining words.⁶²

A case where the omission of certain words would not increase the amount passing under the will, yet would alter the meaning of the remaining words, is unlikely to occur. Suppose a gift of "one hundred dollars to each of my sons, not excepting A.," and no disposition of the residue. Evidence is introduced that the word "not" was inserted by a clerical error. Can the court strike out "not," so that the son will be deprived of his legacy? To do so would not increase the amount going to any one under the will,

⁶¹ As in *Goods of Duane*, 2 Sw. & Tr. 590 (1862).

⁶² Cf. *Swinton v. Bailey*, 4 App. Cas. 70 (1878), on the question of partial revocation by cancellation.

but it would entirely change the meaning of the "not excepting" clause. Such a case has never been discussed, but it is submitted that, for reasons which will be more fully considered below, it is not permissible to effect such a complete change in the meaning of the language of the will as it stood when executed.

(b) Where the rejection would increase the amount of property passing under some part of the will?

Words cannot be inserted, though omitted by a mere clerical error. And where the mistake really was in omitting words, the court will not reject words which were not inserted by mistake, for the purpose of making the will effect the result desired by the testator.⁶³

But suppose the omission of particular words, which were inserted by mistake, would cause the will to give to a person property which it did not give before. For instance, the will when executed contained the words: "I give \$500 to my son William and \$100 to my son John." It appears in evidence that the draft of the will read: "I give \$500 to my son John," and that the words "to my son William and \$100" were inserted by the copyist by inadvertence (*e. g.*, while looking at the wrong line) and were never read by the testator.⁶⁴ Here the mistake is one of insertion, of the sort upon which the court can act; and the will with these words omitted perfectly carries out the testator's intention. Yet probably no court would allow the will to be probated as it stood in the draft, so as to give John \$500.⁶⁵

In *Rhodes v. Rhodes*⁶⁶ Lord Blackburn well states the difficulty: "A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was *inter vivos* they would reform the instrument and order

⁶³ *Harter v. Harter*, L. R. 3 P. & D. 11, 21 (1873). See remarks on *Newburgh v. Newburgh*, 5 Mad. 364 (1820), in Sugden, *Law of Property*, 197. And *cf.* *Stanley v. Stanley*, 2 J. & H. 491 (1862).

⁶⁴ The hypothesis is borrowed from a supposed case discussed in *Miles's Appeal*, 68 Conn. 237 (1896), in connection with the question of partial revocation by cancellation.

⁶⁵ That is, no court would reject the words inserted, if the result would be to give John \$500. It is suggested below that such is not necessarily the result, and that a court of probate may properly reject the words and grant probate in such a form as to prevent such a consequence.

⁶⁶ 7 App. Cas. 192, 198 (1882).

one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the ninth section of the 7 Will. 4 & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning."

The difficulty seems to be as great under any statute. The court cannot put a gift into the will which was not in the will when executed, either by adding words or by rejecting them.⁶⁷

Different views are possible, however, as to whether the rejection of words in certain cases puts something into the will which was not there when it was executed. To cut out a legacy will always increase some other legacy, by increasing the amount of the residue, if not otherwise; unless there is no gift of the residue, or the omitted legacy is itself a residuary gift. It seems, however, that the fact that the residue is increased is no objection to rejecting a legacy inserted by mistake. The meaning of a residuary gift is not changed by the revocation of a legacy. It is meant to carry, not any particular property, but whatever may, for any cause, be undisposed of at the testator's death.⁶⁸

⁶⁷ The question is similar to that which may arise when a testator revokes a portion of his will by cancellation. Suppose a testator bequeaths legacies to John and William in the form above suggested, and attempts to revoke the legacy to William, and increase that to John, by cancelling the same words that the court was asked to reject in the suggested case. All courts would probably refuse to allow the gift to John to be thus increased, and would refuse for the same reason, in substance, as in the case of words inserted by mistake, *i. e.*, because the will at the time of execution did not give a legacy of \$500 to John. The two questions appear at first sight to be entirely different. In the case of insertion by mistake, the court is asked to reject the words because they never formed part of the testator's will; in the case of revocation, because the testator has revoked this portion of his will. One question depends on the statutory requirements for execution, the other on those for revocation. The same court might arrive at different conclusions in the two classes of cases. It might, for instance, rule that a statutory power of partial revocation by cancellation enables a testator to alter his will by striking out words, even to the extent of introducing entirely new gifts. It has been generally assumed, however, that a testator cannot, by an act of revocation, introduce a gift which was not in the will already. (Lord Penzance's *dicta* in *Swinton v. Bailey*, 4 App. Cas. 70, 82 (1878), are not necessarily at variance with such a rule.) And it is submitted that the two classes of cases should turn ultimately on the same question, — whether the disposition which the instrument will contain, after the rejection of the words in question, was contained in the will as it stood when executed.

⁶⁸ In *Farrelly v. Corrigan*, [1899] A. C. 563, it was assumed that the residue could be increased by the rejection of a legacy. In cases of partial revocation by cancellation,

There is, moreover, a large class of cases where the words inserted by mistake are, in effect, qualifications or limitations of a gift which is contained in the will as executed. Usually the removal of a qualification or limitation will enlarge the amount of property passing under the gift. Is the omission of such words proper?

Looking at the substance of the gift, the effect of the omission is to make the will pass something which it did not pass before, or pass it to a different person.⁶⁹

But the English courts have not looked at the question in this way. In *Rhodes v. Rhodes* ⁷⁰ Lord Blackburn states the test to be whether the rejection of the words inserted by mistake "alters the construction of the true part," and again, to be whether it "alters the sense of those which remain." This rule has been interpreted liberally by the English courts, which have rejected not only qualifications and limitations upon gifts, but words which might be more properly described as conditions, revocations, descriptions, or enumerations, and indeed almost every sort of adjective or adverb, or adjective or adverbial phrase.⁷¹

In the cases of *Brisco v. Hamilton* ⁷² and *Morrell v. Morrell*,⁷³ stated above, the court struck out the words "moiety of," and the word "forty," respectively, thereby much increasing the property

the weight of authority, and of reasoning, allows revocation where the result is to increase a residuary gift. *Barrow v. Barrow*, 2 Lee Eccl. 335 (1756); *Bigelow v. Gillott*, 123 Mass. 102 (1877); *Collard v. Collard*, 67 Atl. 190 (N. J., 1907); *Re Frothingham's Will*, 76 N. J. Eq. 331, 74 Atl. 471 (1909); *Re Kirkpatrick's Will*, 22 N. J. Eq. 463 (1871); *Jarman on Wills*, 4 ed., 134. *Contra*, *Miles's Appeal*, 68 Conn. 237, 36 Atl. 39 (1896).

⁶⁹ Cf. the decisions of some courts in analogous cases of partial revocation by cancellation, declining to give effect to the cancellation wherever any other legacy is indirectly increased thereby. *Eschbach v. Collins*, 61 Md. 478 (1883); *Pringle v. M'Pherson*, 2 Brev. (S. C.) 279 (1809). This rule, strictly followed, would seem to forbid even an omission that increases a residuary gift. *Miles's Appeal*, 68 Conn. 237, 36 Atl. 39 (1896). See 24 HARV. L. REV. 558.

⁷⁰ 7 App. Cas. 192, 198 (1882).

⁷¹ Indeed, no case has occurred in which the court has found itself unable to treat the words as a qualification or limitation; so that the question of what the court should do, where the rejection of words would cause the remaining words to undergo a change in grammatical construction or an entire alteration in meaning, has never come up. But see *Anonymous*, Godb. 131, pl. 149 (1587), where the court seems to have gone too far; and *Downhall v. Catesby*, Moore c. p. 356 (1594) where perhaps the minority opinion is preferable.

⁷² [1902] P. 234.

⁷³ L. R. 7 P. D. 68 (1882).

passing by the legacies. In the former case the court speaks of the words rejected as a "limitation or restriction." In *Vaughan v. Clerk*⁷⁴ the court struck out the word "real" before "property," thus making the will pass personal as well as real property.⁷⁵

In *Goods of Oswald*,⁷⁶ stated above, the court struck out a clause of revocation with the result of putting into operation all the provisions of a will which, as the words stood before the correction, was entirely revoked. The same thing has been done in other cases.⁷⁷ Yet what could be a clearer case where an omission of words operates to cause property to pass under a will, which property would not so pass if the words were allowed to remain?⁷⁸

Is this practice of the English courts reconcilable with a due regard for the provisions of the Wills Act? It is submitted that it is; although there may often be difficulty in determining whether the meaning of the remaining words has been altered.

A probate court should look rather at the words of the will than at their ultimate effect, and therefore can properly reject words inserted by mistake, when the remaining words are not changed in meaning, although the result may be to make them carry a larger amount of property. Words are not to be treated as mere counters, and shifted about so as to take on a meaning entirely different from anything that can be found in the will as executed; but it is with words that the court is directly dealing, and if the grammatical construction is such that certain words can be regarded as qualifying or limiting certain others, the omission of qualifying or limiting words can be regarded as not adding anything to the will which was not in it when executed.⁷⁹

⁷⁴ 87 L. T. R. N. S. 144 (1892).

⁷⁵ In *Stanley v. Stanley*, 2 J. & H. 491 (1862), there is a *dictum* that it would be absurd to strike out the words "for life" in a devise to A. for life, in order to make the devise carry a fee simple. It seems, however, that an English court might reject such words at the present day, if a proper case were shown of insertion by mistake without the knowledge of the testator. The court in *Stanley v. Stanley* was not dealing with such a case.

⁷⁶ L. R. 3 P. & D. 162 (1878).

⁷⁷ *Goods of Moore*, [1892] P. 378; *Goods of Wray*, Ir. R. 10 Eq. 266 (1876). And see *Hippesley v. Homer*, T. & R. 48 n. (1804).

⁷⁸ Can the word "not" be struck out? Suppose a legacy "to my daughter if she shall not then be living with her mother." Can "not" be struck out, if inserted by mistake, so that the daughter, if living with her mother, will take? It seems that it cannot. The removal of the negative completely changes the meaning of the clause.

⁷⁹ A probate court cannot insert a legacy even though its omission is the result

It is submitted that the test laid down by Lord Blackburn is the true one in all cases, and it is immaterial whether or not the amount of property passing to any one under the will is increased by the rejection of the words in question. This test, therefore, should control even where there is no increase in the amount of any legacy, as in the case, above put, of the legacy "to each of my sons *not* excepting A."; the result being that the "not" cannot be omitted.

In some cases the mistake has been, not in the insertion of a word, but in the substitution of a wrong word for that which the testator intended to use. Such a case also raises a question whether the omission of the word used by mistake changes the meaning of the remaining words.

In *Goods of Bushell*⁸⁰ the draft of the will contained a legacy to the "Bristol Royal Infirmary," but by a clerical error, in the instrument finally executed, "British" was substituted for "Bristol." The court struck out "British" and inserted "Bristol." In inserting a word, it clearly exceeded its powers.⁸¹ Could it properly strike out "British," leaving a legacy to the "Royal Infirmary"? The remaining words are not exactly what the testator intended to be in the will; the description is imperfect. But they are the testator's words, and the fact that a word has been omitted by mistake is no reason why the remainder of the will should not

of fraud. There is no reason why it should be bound by less strict rules in a case of fraud than in a case of mistake, as to striking out words where the effect may be to enlarge the operation of the remaining words. Indeed, the court might well be more chary of exercising such a power in a case of fraud, because, if it declines to act, a court of equity may remedy the fraud. Yet it has not been suggested that a probate court has no power to strike out a particular part of a will for fraud, because the operation of the remaining words may be enlarged; and the power has been exercised in such a case. *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788 (1903). A revocation procured by fraud should be struck out in the probate court. *Allen v. M'Pherson*, 1 H. L. Cas. 191 (1847).

Owing, perhaps, to the provisions of the Wills Act, and other statutes, doing away with revocation by cancellation, there are few cases on analogous questions with regard to revocation; but there is authority supporting the view that clauses may be thus revoked although the effect may be to enlarge the operation of the remaining words. *Larkins v. Larkins*, 3 B. & P. 16 (1802); *Collard v. Collard*, 67 Atl. 190 (N. J., 1907); *Richardson v. Baird*, 126 Ia. 408, 102 N. W. 128 (1905); *Tomlinson's Estate*, 133 Pa. St. 245, 251, 19 Atl. 482 (1890). (*Semble*, the last case goes too far in some points.) And see the opinion of Lord Penzance in *Swinton v. Bailey*, 4 App. Cas. 70, 82 (1878). The cases on revocation looking the other way have been cited above.

⁸⁰ L. R. 13 P. D. 7 (1887).

⁸¹ *Goods of Schott*, [1901] P. 190.

be proved, or the word which is not the testator's allowed to remain in it. The meaning of the remaining words is the same, although that meaning is not now restricted by the additional adjective which has been rejected.⁸² Very often, as in this case, the remaining words, though not as complete a description of the object as the testator intended,⁸³ are sufficient to identify the object.⁸⁴

Words may be rejected even when the omission results in an evident gap.

In *Goods of Boehm*⁸⁵ the testator gave instructions for a legacy to each of his daughters, Florence and Georgiana. The attorney, by inadvertence, in writing out the will inserted the name of Georgiana in both bequests, so that Florence was given nothing. This error was not noticed by the attorney, nor by the testator, who did not read the will. The court rejected the word "Georgiana" where written the second time. Jeune, J., said:

"It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave

⁸² Other cases in which words substituted by clerical error were rejected are: *Goods of Schott*, [1901] P. 190; *Goods of Wrenn*, [1908] 2 Ir. 370.

⁸³ No description is ever complete, in an absolute sense. See Wigmore, *Evidence*, § 2476, at beginning.

⁸⁴ The court required evidence that there was not a British Royal Infirmary; and apparently, if there had been, would have refused to admit evidence that would have the effect of giving the legacy to the Bristol Infirmary, presumably on the ground that to do so would be contrary to the rule against "disturbing a plain meaning." Here was a strange confusion of ideas. The court had no concern with rules of interpretation, such as the supposed rule against disturbing a plain meaning. Such rules only come into play when it has been determined what are the words which constitute the instrument. *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 115 (1866). Supposing there were an inflexible rule against disturbing a plain meaning (as to which see Thayer, *Preliminary Treatise*, 447-470, Wigmore, *Evidence*, §§ 2462, 2476 (1)), the fact that a British Infirmary existed would be all the more reason for the court's exercising its power to strike out "British." For if a court of construction found on the face of the will a legacy to a British Infirmary which was an existing institution, it might not be able, under the supposed rule, to find that the Bristol Infirmary was meant. But if there were no British Infirmary, then it would make little practical difference whether or not "British" were struck out in the probate, because the court of construction could treat "British" as a mistake and give the legacy to the Bristol Infirmary. In truth the court had no concern with the existence of a "British" or a "Bristol" Infirmary, unless evidence on that point was offered as bearing on the question whether the alteration from the draft was a mistake or a deliberate change.

⁸⁵ [1891] P. 247.

a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions."

The probate not merely omitted the word "Georgiana," but left a blank space where it had been, instead of letting the text run along consecutively as if nothing had ever been written there. This is the practice where the mistake has been one of substitution rather than of mere insertion.

In *Goods of Cooper*⁸⁶ the will, as it stood when executed, appointed Thomas Stevenson one of the trustees, "and the said Thomas Cooper," one of the executors. It was shown that "Cooper" was a draftsman's error for "Stevenson." The court granted probate of the will to Stevenson,⁸⁷ and struck out "Cooper" from the will, so that it read "Thomas . . ." ⁸⁸

The existence of such a blank space in a will, whether due to its never having been filled, or to its having been filled by mistake with a word not intended, is a circumstance which a court of construction can take into account, and to ascertain which it can refer, if necessary, to the original document.⁸⁹ And though the probate court would never allow a physical alteration of the document as executed,⁹⁰ there seems to be no objection to its making the probate correspond as nearly as possible to what the original would be if the rejected words were actually erased.

Although the point has not usually been referred to, it may fairly be said that in none of the decided cases has the rejection of words by the court altered the meaning of the remaining words. Suppose, however, it is impossible to strike out particular words and read the remaining words as they were intended to stand, because to do so would give the remaining words a meaning which they did not have in the will as it stood when executed. In this discussion it has hitherto been assumed that, in such a

⁸⁶ [1899] P. 193.

⁸⁷ The court could have done this without omitting the words in the probate. *Goods of Shuttleworth*, 1 Curt. Eccl. 911 (1838); *Goods of Baskett*, 78 L. T. R. N. S. 843 (1898).

⁸⁸ Another case in which a word was struck out and probate granted with a blank is *Goods of Walkeley*, 69 L. T. R. N. S. 419 (1893).

⁸⁹ *Manning v. Purcell*, 7 DeG. M. & G. 55, 24 L. J. Ch. 522, 523 n. (1855); *Re Harrison*, L. R. 30 Ch. D. 390 (1885).

⁹⁰ See *Finch v. Combe*, [1894] P. 191, 193.

case, the words cannot be omitted. But ought the court to decline to do anything?

Take, for instance, the case above supposed of a will reading: "I give \$500 to my son William and \$100 to my son John." The words "to my son William and \$100" are proved to have been inserted by a clerical error. It may be assumed that the will cannot be amended so as to give John his \$500. But should it be left so that William will get \$500 by reason of the copyist's mistake? It seems that the way out of the dilemma is to reject the words, and leave blanks, so that the will reads: "I give \$500 to my son John." Whether this constitutes a gift of \$500 to John is a question of construction, though of a rather unusual sort, the question being what was the meaning of those words when the will was executed. On this, the fact that other words then stood in the blank spaces can be considered by the court.⁹¹ If a court of construction decides, as it probably would, that there is no gift to John, the consequence is that neither William nor John will get anything.⁹²

In theory the probate court ought not to concern itself with the effect of striking out words, but ought, in all cases, to reject words inserted by mistake and leave the will as thus corrected to a court of construction to interpret, only taking care to issue the probate in such a form, and have the facts as to the original state of the will so appear in the record, that the court of construction may have all proper materials.⁹³ That the result may be to render par-

⁹¹ Cf. *Shea v. Boschetti*, 18 Beav. 321; S. C. 18 Jur. 614 (1854); *Gann v. Gregory*, 3 DeG. M. & G. 777; S. C. 2 Eq. Rep. 605 (1854); *Manning v. Purcell*, 7 DeG. M. & G. 55; S. C. 24 L. J. Ch. 522 (1855); *Re Wyatt*, 4 T. L. R. 245.

⁹² Puzzling cases will occur, such as the two legacies, above suggested, where the word "not" was introduced by mistake. Nevertheless it is submitted that the probate court ought never to let the words stand as they are, but should probate the will with a blank, and let a court of construction struggle with the resulting imperfect disposition. "To each of my sons excepting A." might be treated either as a gift to each son, coupled, as to A.'s gift, with a qualification which was void for uncertainty; or the gift to A. might be treated as invalid on account of the uncertainty of its terms. "To my daughter, if she shall then be living with her mother," might be treated either as a gift to the daughter free of condition, the condition being void for uncertainty; or as no gift at all, the uncertainty of the contingency invalidating the whole gift.

⁹³ This theory would result in removing all the questions under *B* (2), (a) and (b), as to the extent to which words can be rejected, out of the way of the probate court. In practice, where it is a case of mere insertion, not substitution, so that the will can be

ticular gifts invalid for uncertainty is no concern of the probate court. The court of construction must consider whether it can give effect to the remaining words, but it is relieved of the necessity of giving effect to the instrument as it stood with the words inserted by mistake.

Roland Gray.

HARVARD LAW SCHOOL.

made to read just as the testator intended it should, and there is clearly no alteration in the meaning, no blank is left in the probate. If any question as to alteration in the meaning should arise, the original will and the record of the probate court can be referred to.

NOTICE TO A CORPORATION FROM ENTRIES ON ITS BOOKS.

SUPPOSE that the books of a corporation kept in the usual course of its business record certain facts. Suppose further that an officer of the corporation, acting on its behalf within the scope of his powers but personally ignorant of the facts so recorded, makes a contract with respect to which those facts are material. Is the corporation charged with notice of those facts? The question may be put in concrete form. Assume that the books of a corporation disclose that a certain negotiable note is held by A. in trust for B. A. brings the note before maturity to an officer of the corporation who is personally ignorant of the trust. This officer discounts the note on behalf of the corporation and applies the proceeds to reduce the personal overdrafts of A. Is the corporation a *bonâ fide* purchaser of the note or does it hold the note subject to the trust? In a word, is a corporation charged with notice of the facts which are recorded upon its books in the usual course of its business even though the officer who acts on its behalf is ignorant of them?

Our problem divides into three parts. First, can a corporation have knowledge or notice? Second, how can a corporation receive knowledge or notice? Third, if a corporation have knowledge or notice is it material that the officer who acts on its behalf has no personal knowledge of the matter in question?

I.

A distinction is sometimes made between actual knowledge or notice and constructive notice. Actual knowledge or notice involves conscious perception of a fact. It is the result of the operation of mind upon the impressions received through the senses. Constructive notice is a legal inference drawn from an opportunity to know which the law presumes that the individual has utilized. Thus the law ordinarily presumes that an agent has disclosed to his principal whatever pertinent information the agent possesses with

respect to the matters in which he acts as such agent.¹ It is said, therefore, that the knowledge of the agent as to matters in which he acts for the principal is notice to the principal, even though no disclosure has in fact been made.² Again, the recording-acts frequently make the records made thereunder constructive notice of the facts recorded even though these records have not been examined. In some states the rule obtains that one who receives a document and has opportunity to read it, is charged with constructive notice of its contents even though the document be in fact unread.³ It has also been held that open and unequivocal possession of land is constructive notice of the interest of the possessor therein.⁴ In a word, constructive notice is merely evidence of knowledge of so violent a character that the law will not permit it to be controverted.⁵ In many instances, therefore, constructive notice is a substitute for and legally equivalent to actual knowledge.

Can a corporation have actual knowledge? It is a legal entity. It has no physical existence nor outward embodiment. It has no mind. It has only representatives. In certain aspects it is represented by the stockholders, yet the stockholders are not the corporation. The corporation can neither think, feel, nor perceive. It follows that this incorporeal legal entity cannot receive or possess actual knowledge.

But a corporation does business as individuals do. It can contract though it actually possesses no mind to meet the mind of the other party. It can conspire as if it possessed a physical brain.⁶ It would be most unjust if it could escape the liabilities imposed by knowledge of facts because it possesses no physical intelligence

¹ *Suit v. Woodhall*, 113 Mass. 391, 395 (1873); *Bank of the United States v. Davis*, 2 Hill (N. Y.) 451, 464 (1842); *The Distilled Spirits*, 11 Wall. (U. S.) 356, 367 (1870); *Stanley v. Schwalby*, 162 U. S. 255, 276 (1896); *Cole v. Getzinger*, 96 Wis. 559, 576, 71 N. W. 75, 80 (1897).

² See cases cited in note 1.

³ *Hoadley v. Northern Transportation Co.*, 115 Mass. 304 (1874); *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246 (1903); *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.) 506 (1813).

⁴ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417 (1892).

⁵ See *Townsend v. Little*, 109 U. S. 504, 511 (1883); *Shauer v. Alterton*, 151 U. S. 607 (1894).

⁶ *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823 (C. C., S. D. N. Y., 1906).

and is incapable of those intellectual processes which result in knowledge in the individual. Corporations, it is true, can act only through their officers, directors, attorneys, servants, and agents. But even in the case of a human principal it is settled law that knowledge as to matters within the scope of the agency possessed by an agent who acts for his principal is notice to the principal, even though the agent in fact make no disclosure.⁷ Indeed constructive notice to the agent is constructive notice to the principal.⁸ This doctrine of constructive notice has been extended in its fullest application to corporations. True, the officer, director, servant, or agent cannot make disclosure to the corporate entity. But, in so far as he represents the corporation and acts for it, knowledge or notice possessed by him as to matters within the scope of his authority is as matter of law notice to the corporation.⁹ As to corporations, then, constructive notice is a substitute for and legally equivalent to actual or constructive knowledge in a human being.

II.

It has been necessary to consider these somewhat elementary matters in order to determine the effect of corporate records as notice to the corporation. Generally speaking, corporate records are of two kinds. First come the records of corporate action by the stockholders, board of directors, executive committee, and the like. These generally consist of votes or resolutions, or minutes of business transacted at the meetings. The second species of corporate record is its business books and incidental records, such as its journal, cash-book, ledger, check-books, and files of letters. These also record corporate action, though usually action of a less solemn character than the votes or resolutions passed at corporate meetings. Corporate books, then, whether minute books or account books, record corporate action. They differ in degree with the power of the corporate agents whose actions they record.

It seems curious that there is little, if any, authority upon the

⁷ *Ante*, note 1.

⁸ *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417 (1892).

⁹ *Manhattan Bank v. Walker*, 130 U. S. 267 (1889); *National Security Bank v. Cushman*, 121 Mass. 490 (1877); *Trapp v. Fidelity National Bank*, 101 Ky. 485, 41 S. W. 577 (1897); *Twenty-Sixth Ward Bank v. Stearns*, 148 N. Y. 515, 42 N. E. 1050 (1896).

effect of corporate minute books as notice to the corporation. The writer has been unable to find any case which directly passes on this question. On principle, however, the result seems clear. The minute books record action on behalf of the corporation by its stockholders, directors, executive committee, or the like. Here we have every element necessary to affect a human principal with constructive notice through his agent. The action is on behalf of the corporation. Generally it is not in excess of the authority possessed by those who act. The information recorded is present to the minds of those who act, as the record shows. These are precisely the requisites of notice to a principal through his agent.¹⁰ There seems little doubt that the same rule will be applied to a corporation as to a human principal.

The argumentative authority looks the same way. Thus knowledge possessed by a director who does not act on behalf of the corporation does not affect the corporation.¹¹ But if a director meets and acts with the board, the corporation is charged with the knowledge which he possesses as to the matter in hand even though he does not disclose it.¹² If information possessed by a director becomes notice to the corporation when he acts with the board even though it remains locked in his own breast, how much more effective must be information which is disclosed and spread upon the records? Moreover, these very records are the best evidence of the matters properly recorded. Duly identified, they are admissible even between third parties.¹³ Evidently a corporation cannot escape notice of its own corporate acts. It seems to follow that its own records, which are the best evidence of what was done, must be notice to it of that which is properly recorded.

Perhaps some question might arise as to a record of acts purporting to be in behalf of the corporation but in excess of its cor-

¹⁰ *The Distilled Spirits*, 11 Wall. (U. S.) 356 (1870).

¹¹ *Fulton Bank v. Canal Co.*, 4 Paige (N. Y.) 127 (1833); *Atlantic State Bank v. Savery*, 82 N. Y. 291 (1880); *Casco National Bank v. Clark*, 139 N. Y. 307, 34 N. E. 908 (1893); *First National Bank v. Christopher*, 40 N. J. L. 435 (1878); *Innerarity v. Merchants' Bank*, 139 Mass. 332, 1 N. E. 282 (1885).

¹² *Bank of the United States v. Davis*, 2 Hill (N. Y.) 451 (1842); *Twenty-Sixth Ward Bank v. Stearns*, 148 N. Y. 515, 42 N. E. 1050 (1896); *National Security Bank v. Cushman*, 121 Mass. 490 (1877); *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345 (1903); *Union Bank v. Campbell*, 4 Humph. (Tenn.) 394 (1843).

¹³ *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434 (1886); *Howard Ins. Co. v. Hope, etc. Ins. Co.*, 22 Conn. 394 (1853); *Hudson v. Carman*, 41 Me. 84 (1856).

porate powers. At one time some courts took the view that a corporation was unable to act in excess of the powers conferred upon it. But this view is now generally exploded. True, the courts will not, as a general rule, aid either party to enforce an executory agreement in excess of the corporate powers. Yet they will usually decline to undo an executed transaction on the ground that it was beyond the powers of the corporation.¹⁴ Indeed an executed *ultra vires* act may be the foundation of corporate rights and liabilities.¹⁴ It follows that an act in excess of the corporate powers is still a corporate act, though an improper one. But such an act, if transacted at a corporate meeting, should appear in the records. It is the duty of the recording officer to keep a true record, and if such act were not recorded the record would be untrue. Yet if a corporation can sin, and it is the duty of the recording officer to record the acts of the meeting truly whether they be proper or *ultra vires*, it would be most inequitable to hold that only the records of good deeds are notice to the corporation. It would put a premium upon *ultra vires* transactions. Consequently whatever is properly recorded should be notice to the corporation whether the matter recorded be within or outside the corporate powers.

III.

We turn now to the effect of entries in the usual course of business upon the less formal books of the corporation, such as the journal, cash-book, ledger, and the like. Such entries are usually made by servants of the corporation having small powers and limited discretion. Yet the humblest servant of a corporation may be a conduit of information and affect the corporation with notice. If the knowledge possessed by the servant and present to his mind¹⁵ be pertinent to matters within the scope of the servant's employment and concern matters as to which he acts on behalf of the corporation, such knowledge becomes the knowledge of the corporation. Thus where it was part of the duty of a cleaner of

¹⁴ Executed Ultra Vires Transactions, by Edward H. Warren, 23 HARV. L. REV. 496.

¹⁵ The Distilled Spirits, 11 Wall. (U. S.) 356, 367 (1870) *semble*; Constant v. University of Rochester, 111 N. Y. 604, 19 N. E. 631 (1889). But the evidence that the transaction was present to the agent's mind need not be strong, and such knowledge may be inferred from the circumstances. Holden v. New York & Erie Bank, 72 N. Y. 286 (1878).

electric lights to note and report defects, and the cleaner in the exercise of his service observed that a pole was defective but failed to report, the corporation was nevertheless charged with his knowledge.¹⁶ Again, a notice as to matters within the scope of his employment given to a bookkeeper,¹⁷ local insurance agent,¹⁸ general claim agent,¹⁹ paying teller,²⁰ or receiving teller²¹ has been held to be notice to the principal. On the other hand, a notice of the dissolution of a partnership given to a drummer whose duty did not extend beyond receiving and transmitting orders is knowledge beyond the scope of the drummer's employment and so not notice to his principal.²² But book entries made in the usual course of business fall within the strictest limits of the general rule. They are made by a servant acting within the scope of his employment and in the exercise of his service. On principle, therefore, such entries should be notice of the matters entered. Here also the direct authority is singularly scanty. The writer has found only three cases which directly deal with the question.

In *Brady v. North Jersey Street Ry. Co.*²³ a motorman brought action to recover for injuries caused by a defective car. The defendant company kept a book in which it was the duty of each motorman to enter the condition of his car at the close of the run. The plaintiff was permitted to prove an entry as to the car in question by another motorman in these terms: "bad hand brake, sand box out of order." On appeal the judgment for the plaintiff was reversed²⁴ on the ground that there was no admissible evidence of the defective condition of the car. In regard to the effect of this entry, Bergen, J., said:

"That this evidence would have some weight in determining the question whether the defendant had notice of the defective condition of the

¹⁶ *City of Denver v. Sherret*, 88 Fed. 226 (C. C. A., Eighth Circ., 1902).

¹⁷ *Dillon v. Anderson*, 43 N. Y. 231 (1870).

¹⁸ *Dick v. Equitable Fire, etc. Ins. Co.*, 92 Wis. 47, 65 N. W. 742 (1896).

¹⁹ *Atkinson v. Chicago & N. W. Ry.*, 93 Wis. 362, 67 N. W. 703 (1896).

²⁰ *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532 (1858); *Skinner v. Merchants' Bank*, 4 Allen (Mass.) 290 (1862).

²¹ *First National Bank v. Fourth National Bank*, 56 Fed. 967 (C. C. A., Sixth Circ., 1893).

²² *Neal v. M. E. Smith & Co.*, 116 Fed. 20 (C. C. A., Eighth Circ., 1902).

²³ 76 N. J. L. 744, 71 Atl. 238 (1908), headnote inadequate.

²⁴ The verdict for the plaintiff was set aside by the Supreme Court (74 N. J. L. 413), and this action was affirmed by the Court of Errors and Appeals.

car, if it was defective, cannot be disputed. The condition of the car cannot be established by such entry, and its use must be confined to the question whether defendant had notice of a condition shown to exist, and cannot be accepted as primary proof of the condition it states."

In *New England Car-Spring Co. v. Union India Rubber Co.*²⁵ the right of the plaintiff depended on the assent of the defendant to the grant of certain patent rights. The grantor had given \$1000, one-fourth of the purchase price received from the plaintiff, to the treasurer of the defendant in accordance with a prior agreement. The receipt of this amount was entered upon the books of the company. For the defendant it was argued that the entries on the books were not such notice that the retention of the \$1000 constituted an assent. The court ruled that the entries on the books of the corporation constituted notice to it so that the retention of the \$1000 was an assent to the sale. *Ingersoll, J.*, said:

"It appears on the books of the corporation that a draft, drawn by Charles Ely on Edward Crane, for \$1000 was received, and that the 'patent account' was credited with that draft. . . . The entry on the books fully apprised the corporation that the \$1000 draft was paid and received on the 'patent account.' It also apprised the directors. By inquiry the directors could have ascertained for what particular reason the \$1000 draft was credited to 'the patent account.' It was the duty of the corporation, through its agents, the directors, to make such inquiry. It is to be presumed that the directors performed this duty. . . . If the directors, by a neglect of their duty, were ignorant of this entry on the books, and of the purpose for which the draft was received, the corporation cannot set up such neglect of duty in its agents, to show that it had no knowledge of the transaction as it actually was."

²⁵ 4 Blatchf. 1 (C. C., Second Circ., 1857), headnote inadequate. In more detail the facts were these: In 1844 Goodyear, the patentee, gave to the defendant an exclusive license covering the whole right granted by the patent. He, however, reserved to himself the privilege of selling for a sum in gross the exclusive right for any particular subject of manufacture, provided that such right should first be offered to the defendant at the same price and such offer remain unaccepted by the defendant for sixty days. If the defendant should not accept the offer, one-fourth of such purchase price was to be paid to it before the right was transferred to the purchaser. In 1847 Goodyear sold to Charles Ely and Edward Crane for \$4000 the exclusive right to use his invention in the manufacture of car springs. Before the sale he orally offered this right at that price to the treasurer of the defendant. The offer was not accepted within the sixty days. Before the transfer to Ely and Crane, Goodyear gave to the treasurer of the defendant a draft for \$1000, which was cashed and the proceeds entered on the

In *Allen v. Puritan Trust Co.*²⁶ the proof showed that one Baker had two accounts with the defendant trust company. The first was his personal account. The other was entered upon the books as "Estate of Albert H. Bird, William L. Baker, administrator." On four different occasions Baker's personal account became overdrawn. He then drew checks upon the "Estate" account, which the defendant accepted in payment of the overdraft. After Baker's death the new administrator *de bonis non* of Albert H. Bird brought suit to recover the amount of these checks. A master found for the plaintiff. In affirming this decree the court said, through Braley, J.:

"The personal property of the estate was held by him [Baker] in a fiduciary capacity, and the nature of the respective accounts was fully disclosed by the contract. And in the discharge of their several duties, which were fully detailed by the master, the officers and agents of the defendant [trust company] were charged with knowledge of the scope and effect of the various entries relating to the deposit and shown on the defendant's books."

These two latter cases, then, hold that a corporation is charged with notice of entries made upon its books in the usual course of business. It is also said that the agents of the corporation in acting for it are charged with knowledge of such entries. It seems unnecessary, however, to impute such knowledge to the agents. The act of such agents on behalf of the corporation is the act of the corporation itself.²⁷ The corporation itself has notice of the facts in question from its own books, through the agents who made the entries. The situation then is that a principal who knows the facts acts through an agent who is ignorant. But if the principal knows the facts that should be sufficient. The better view would seem to be that the corporation is directly affected with notice of the entries on its own books, rather than that such notice is constructively dragged into the ignorant agent in order that his constructive knowledge may become the constructive knowledge of

books. Crane and Ely assigned their right to the plaintiff. The court granted a provisional injunction to refrain infringement of the patent by the defendant.

²⁶ 211 Mass. 409, 97 N. E. 916 (1912).

²⁷ *American Fur Co. v. United States*, 2 Pet. (U. S.) 358, 364 (1829); *Clicquot's Champagne*, 3 Wall. (U. S.) 114, 140 (1865); *Stockwell v. United States*, 13 Wall. (U. S.) 531, 550 (1871).

his principal. The absurdity of charging the corporation with knowledge indirectly through the ignorant agents instead of directly through the entries is shown by those cases which hold that even directors are not personally chargeable as matter of law with knowledge of that which appears upon the corporate books.²⁸

Another line of cases argumentatively supports the view that a corporation as matter of law has notice of those entries made upon its books in the usual course of business. Such books or entries are competent against the corporation as an admission by it. Thus a schedule,²⁹ annual report,³⁰ report of superintendent to directors,³¹ train sheet,³² account on the corporate books,³³ and deposit envelope³⁴ have all been held competent as admissions by the corporation. But if the nature of the entry were not known to the corporation, the entry itself would scarcely constitute an admission by the corporation. Moreover, these cases further support the view that the making of an entry upon the books of a corporation in the usual course of business is a corporate act. A corporation can scarcely be held to be ignorant of the things which it does as a corporation.

Yet it does not follow that everything which appears upon the books of a corporation is an admission by it or notice to it. It is familiar law that the knowledge of an agent engaged in defrauding his principal is not notice to the principal.³⁵ The presumption

²⁸ *Briggs v. Spaulding*, 141 U. S. 132 (1890); *Wakeman v. Dalley*, 51 N. Y. 27 (1872); *Hallmark's Case*, 9 Ch. D. 329 (1878). But it is the personal duty of directors to use reasonable diligence to ascertain the facts as to the corporation and its business. *Martin v. Webb*, 110 U. S. 7 (1883).

²⁹ *Clicquot's Champagne*, 3 Wall. (U. S.) 114 (1865).

³⁰ *Bailey v. Railroad*, 22 Wall. (U. S.) 604 (1874).

³¹ *Vicksburg, etc. R. Co. v. Putnam*, 118 U. S. 545 (1886); *Le Abra, etc. Mining Co. v. United States*, 175 U. S. 423 (1899).

³² *Missouri, K. & T. Co. v. Elliott*, 102 Fed. 96 (C. C. A., Eighth Circ., 1900).

³³ *Simpson v. First National Bank*, 129 Fed. 257 (C. C. A., Eighth Circ., 1904); *Barber A. P. Co. v. Forty-Second St., etc. Ry. Co.*, 180 Fed. 648 (C. C. A., Second Circ., 1910); *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. App. 55, affirmed 88 Mo. 202 (1885).

³⁴ *L'Herbette v. Pittsfield National Bank*, 162 Mass. 137, 38 N. E. 368 (1894).

³⁵ *American Surety Co. v. Pauly*, 170 U. S. 133 (1898); *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342 (1902); *Bank of Overton v. Thompson*, 118 Fed. 798 (C. C. A., Eighth Circ., 1902); *Dillaway v. Butler*, 135 Mass. 479 (1883); *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917 (1889); *Benedict v. Arnaud*, 154 N. Y. 715, 49 N. E. 326 (1898); *Brooklyn, etc. Co. v. Standard, etc. Co.*, 193 N. Y. 551, 86 N. E. 564 (1908).

that an agent discloses to his principal whatever is known to the agent and pertinent to the agency is not pushed to the absurdity that the agent is presumed to disclose to the principal the fraud which the agent is working upon him. The same principle applies to book entries. An entry fraudulently made upon the corporate books is not an admission by the corporation or binding upon it unless the corporation be estopped to show the fraud.³⁶ In fairness a similar rule should obtain with respect to notice from such fraudulent entries. Indeed there is authority which looks in this direction. Thus one who becomes surety upon a fidelity bond given to a corporation to secure the honesty of an employee is not discharged because the corporation does not disclose that the employee is dishonest, where such dishonesty was unknown to the agents of the corporation who took the bond on its behalf, even though such dishonesty would have been discovered had those agents used due care in examining its books.³⁷ It is true that in none of these cases was the effect of the books as notice directly considered. Yet these cases indicate, if they do not decide, that entries made in fraud of the corporation are not notice to the corporation. To render the entry notice to the corporation it must be made upon its behalf in the usual course of business.

IV.

We now reach the last phase of our problem. Assume that the corporation has notice of a certain fact from its books or otherwise, but that the officer who acts on its behalf is personally ignorant of the fact in question. Is the corporation bound by knowledge of the fact? This is the converse of the usual problem of the ignorant principal and the well-informed agent. In the present case the principal knows and the agent does not know.

Logically the problem is not difficult. As has been already shown the law, under the proper circumstances, charges an inno-

³⁶ *Holden v. Hoyt*, 134 Mass. 181 (1883); *City Electric St. Ry. Co. v. First National Bank*, 62 Ark. 33, 34 S. W. 89 (1896).

³⁷ *Tapley v. Martin*, 116 Mass. 275 (1874); *Bowne v. Mount Holly Bank*, 45 N. J. L. 360 (1883); *Wayne v. Commercial National Bank*, 52 Pa. St. 343 (1866); *Bennett v. Building Association*, 57 Tex. 72 (1882). But the surety would be discharged if such information were knowingly withheld. *Railton v. Matthews*, 10 Cl. & Fin. 934 (1844); *Smith v. Governor, etc. of Bank of Scotland*, 1 Dow 272 (1813).

cent principal with the knowledge possessed by his agent.³⁸ It is just that the principal who carries through a transaction by means of several agents should stand legally in the same situation as if he had performed the whole operation in person. Were this not the rule a man could escape all knowledge by multiplying agents. Since for this purpose the law under certain conditions identifies agent and principal, it does not seem material in which of them the knowledge is. If the knowledge of the agent may by law affect the principal, the knowledge of the principal should equally affect the acts performed for him by the agent. In justice the rule should work both ways. Yet the cases are few.

In *Mechanics' Bank of Alexandria v. Seton*,³⁹ Seton brought a bill in equity to compel the bank to transfer to him certain stock of the bank which stood upon the books in the name of one Lynn, alleging that Lynn held the stock as trustee for him. The bank set up in defense that it had made loans to Lynn in good faith upon the security of the stock. The proof tended to show that at the time the stock was entered on the books in the name of Lynn notice of the trust was given to the then board of directors. Subsequently a different board made loans to Lynn upon the security of the stock in ignorance of the trust. The court decided that the bank was charged with notice of the trust. The principle is thus stated by Thompson, J.:

"Notice to the board of directors when this stock was transferred to Lynn that he held it in trust only was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that if the bank had sustained any injury by reason of the subsequent board not knowing that Lynn held the stock in trust, it would result from the negligence of its own agents and could not be visited upon the complainants."

In *Curtice v. Crawford County Bank* ⁴⁰ the question was whether the defendant bank obtained a statutory lien upon certain stock with notice of the rights of the plaintiff in such stock. The Court

³⁸ *Duncan v. Jaudon*, 15 Wall. (U. S.) 165 (1872). See also *Armstrong v. Ashley*, 204 U. S. 272 (1906).

³⁹ *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. (U. S.) 299 (1828). See also *New England Car-Spring Co. v. Union India Rubber Co.*, 4 Blatchf. 1, 7 (C. C., Second Circ., 1857); *Allen v. Puritan Trust Co.*, 211 Mass. 409, 420, 97 N. E. 916, 920 (1912), already discussed, p. 244.

⁴⁰ 118 Fed. 390 (C. C. A., Eighth Circ., 1902).

of Appeals found that two or three years before the bank made its loans upon the stock Curtice gave notice of his interest to Turner, the president of the bank, and that the loans were made by other officers of the bank who were ignorant of the plaintiff's rights. The court, in deciding that the bank took subject to Curtice, said, by Thayer, J.:

"Under these circumstances we are of opinion that Turner must be regarded as having been acting for the bank when he received notice that the stock was held in pledge by Curtice, and that the knowledge which was acquired in the course of that interview affected the bank generally even if it was not communicated to the other executive officers. It was at least knowledge of a fact which ought to have been communicated to the other officers of the corporation to govern their future action."

In *Elliott v. Worcester Trust Co.*⁴¹ the plaintiff sued to recover a sum of money which had been deposited in the City National Bank with which the defendant had merged. The defendant set up as a defense that this deposit had been paid out to take up notes of the plaintiff payable at the City National Bank. The agreed facts admitted that prior to the merger the plaintiff had notified the City National Bank not to pay such notes and that none of the defendant's officers knew of such notice. Upon the plaintiff's account was stamped a notice that the deposit was "held on the same terms as it was held by the City National Bank." The court decided that the defendant was bound by the notice given to its predecessor even though this was not known to any of the defendant's officers.

In *Gibson v. National Park Bank*⁴² a certain railroad carried its deposit with the defendant bank in the name of its treasurer. This was known to the executive officers of the bank. The account was attached as the account of the railroad by a railroad creditor. It was thereafter paid out by a teller who did not know of the attachment. The attaching creditor sued the bank, and it was held that he could recover. Chief Justice Ruger thus states the principle:

⁴¹ 189 Mass. 542, 75 N. E. 944 (1905). See also *Allen v. Puritan Trust Co.*, 211 Mass. 409, 420, 97 N. E. 916, 920 (1912).

⁴² 98 N. Y. 87 (1885).

"It [the bank] cannot shield itself from liability by alleging the ignorance of the agent making the payment, while other agents, having authority and owing a duty to act in the premises had knowledge of the facts, which made such payment a violation of duty on the part of the corporation."

The English cases should be considered by themselves in chronological order.

In *Mayhew v. Eames*⁴³ the plaintiffs brought assumpsit against a common carrier for the loss of a package containing £87 in bank notes. The defendant relied upon a notice given to the plaintiffs themselves, that he would not be liable for any package exceeding £50 in value unless that value was stated and paid for accordingly. The clerk who did up the package and delivered it to the defendant knew the contents of the package but was ignorant of the notice. In directing a nonsuit *Abbott, C. J.*, said:

"The traveller was their [plaintiff's] agent and made the contract solely on their behalf; and as it is so the notice applies as much as if they had themselves given the parcel out to be carried."

The case was then carried to the Court of King's Bench,⁴⁴ which affirmed the judgment *per curiam*:

"But the knowledge of the principal is the knowledge of the agent. . . . But as the plaintiffs suffered their agent to send notes by these coaches, we think that knowledge of the notice having been brought home to the plaintiffs the carrier is thereby protected from such loss, although the parcel was sent by an agent."

*Willis v. Bank of England*⁴⁵ was an action of trover by the assignee in bankruptcy of N. to recover the value of three post bills which had been accepted by the bank. On March 16 the assignee gave notice to the London office of the bank to stop payment on the bills. On April 12 N. cashed the bills before maturity at the Gloucester branch of the bank. The agent at the Gloucester branch was ignorant that notice to stop payment had been given. There was a verdict for the plaintiff which was upheld on appeal. Lord Denman thus states the rule:

⁴³ 1 Car. & P. 550 (1825).

⁴⁴ 3 B. & C. 601 (1825).

⁴⁵ 4 Ad. & E. 21 (1835). Both cases were cited and distinguished in *Powles v. Page*, 3 C. B. 16 (1846).

"The general rule is that notice to the principal is notice to all his agents; at any rate if there be reasonable time, as there was here, for the principal to communicate that notice to his agents before the event which raises the question happens."

The case of *Cornfoot v. Fowke*,⁴⁶ which must next be considered, has been the subject of considerable judicial limitation and criticism. In brief the facts were these. The plaintiff sued upon a written agreement to take a lease of a furnished house. The defendant pleaded that he was induced to make the agreement "by means of the fraud, covin, and misrepresentation" of the defendant. The evidence tended to show that before the agreement was made the defendant asked the agent of the plaintiff: "Pray, sir, is there anything objectionable about the house?" that the agent replied: "Nothing whatever"; that the house next door was a brothel; that this was known to the plaintiff but not to his agent; and that the plaintiff did not know of the representation. The Court of Exchequer gave judgment for the defendant. The reasons given were various. Rolfe, B., held that the authority of the agent to make the representation had not been shown. Parke, B., and Alderson, B., held that the plea of "fraud and covin" had not been made out by proof that the agent innocently represented that there was nothing objectionable about the house while the principal knew that there was a brothel next door. Lord Abinger, C. B., dissented on the ground that for the purpose of the plea the representation of the agent was to be considered that of the principal, and the falsity of the representation to the knowledge of the principal was sufficient to sustain the plea.

The opinions of Parke, B., and Alderson, B., proceed upon the theory that proof of conscious moral obliquity, either in the agent or in the principal, is essential to sustain a plea of fraud and covin. They then draw the obvious conclusion that an innocent principal who has knowledge and an innocent agent who makes a misrepresentation do not, even if added together, produce the conscious moral obliquity demanded by the plea. Lord Abinger, on the other hand, maintains that moral obliquity need not be proved to sustain a plea of fraud and covin. He considers that the knowledge of the principal and the innocent misrepresentation of the agent must be

⁴⁶ 6 M. & W. 358 (1840).

considered together, and so considered are sufficient to sustain the plea. Plainly, therefore, the question decided was as to the nature of the proof required to sustain a plea of fraud and covin.⁴⁷

Moreover, the decision is considerably shaken by the later case of *Ludgater v. Love*.⁴⁸ That was an action for damages for an alleged fraudulent representation by the son of the defendant upon the defendant's behalf. The son, to induce the plaintiff to buy certain sheep belonging to the father, represented that the sheep were all right. The defendant purchased in reliance upon this representation. In fact the sheep had the rot. This the father knew when he committed the sheep to the son to sell, but withheld the information from the son, who acted in good faith. The jury found these facts specially, and a verdict was entered for the plaintiff. The case was thereupon taken to the Court of Appeal, where the judgment was affirmed. In the course of his opinion Brett, L. J., said:

"If the son was authorized to make the representations, whether such authority was express or implied, we are of opinion that the defendant was, by reason of his own fraudulent mind, liable, notwithstanding want of fraud in the son. We are of this opinion notwithstanding the decision of *Cornfoot v. Fowke* (*ubi sup.*) if that decision is contrary to this view."

The four American cases, then, are unanimous in holding that a corporation affected with notice does not escape the effect of such notice because the facts are not known to the agent who acts on its behalf. New York, Massachusetts, and the federal courts all take this view. The English cases, on the other hand, are somewhat wavering. *Mayhew v. Eames* and *Willis v. Bank of England* decide squarely that if the principal has notice he is bound even though the agent is ignorant. Then comes the confusion created by *Cornfoot v. Fowke*. This injects into the situation the rather narrow English rule that to sustain an allegation of fraud there must be proof of *conscious* moral obliquity.⁴⁹ In this respect the

⁴⁷ See the remark of Willes, J., during the argument in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 (Ex. Ch. 1867), and the careful explanations of the case by Lord Brougham and Lord St. Leonards in *National Exchange Co. v. Drew*, 2 Macq. 103, at pp. 108 and 144 (H. L., 1855).

⁴⁸ 44 L. T. R. N. S. 694 (C. A., 1881). See also *Fuller v. Wilson*, 3 Q. B. 58, s. c. reversed on a point of pleading *sub nom.* *Wilson v. Fuller*, 3 Q. B. 68, 1009 (Ex. Ch., 1843).

⁴⁹ See *Derry v. Peck*, 14 App. Cas. 337 (1889).

American cases lay stress upon the result to the injured party instead of upon the state of mind of the man who makes the representation. Thus in this country the better view is that deceit will lie where a representation of fact, made as of knowledge and relied upon, is untrue, even though the party who made the representation honestly believed it to be true.⁵⁰ *Cornfoot v. Fowke*, however, has been considerably limited and criticized, and in the later case of *Ludgater v. Love* is treated as of slight authority. It must be remembered, also, that all these English cases except *Willis v. Bank of England* deal with human principals. That case concerned a corporation and is in accord with the American view. In view of the peculiar judicial history of *Cornfoot v. Fowke*, *Willis v. Bank of England* seems to be unshaken and to be the controlling authority.

Both upon principle, then, and upon authority a corporation as matter of law is charged with knowledge of entries made upon its books on its behalf in the usual course of business. If facts so recorded are material the corporation cannot escape the effect of such notice because the agent who acts on its behalf is ignorant of the entries. The cases suggest that the agent is constructively charged with such knowledge, and that his constructive knowledge becomes the constructive knowledge of the corporation. This seems rather like whipping the devil round a stump in order to attain a just result. It is far simpler and more logical to hold that entries made upon the corporate books on its behalf and in the usual course of business are notice directly to the corporation as matter of law.

Edwin H. Abbot, Jr.

BOSTON, MASS.

⁵⁰ *Litchfield v. Hutchinson*, 117 Mass. 195 (1875); *Fisher v. Mellen*, 103 Mass. 503 (1870); *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726 (1889); *Lehigh Zinc, etc. Co. v. Bamford*, 150 U. S. 665 (1893).

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President.*
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer.*
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,

FRANCIS S. WYNER.

JURISDICTION FOR ANNULMENT OF MARRIAGE. — To arrive at a correct solution of the problem of the jurisdiction of courts to annul marriage it is necessary, first of all, to understand the fundamental distinction between annulment and divorce. In the latter the court assumes the previous existence of the marriage status, and declares that it shall from henceforth be dissolved. If this decree be rendered by a court having jurisdiction over the status, the result is to put an end to that status for the future without affecting its existence in the past. The purpose of annulment, on the other hand, is to discover whether or not a valid marriage has ever taken place, and if this question be answered in the negative, to declare the supposed marriage a nullity.¹ The decree of nullification purports to destroy from the outset what may possibly have been a legal marriage status, together with all rights and liabilities based upon the existence of that status.² Since this decree is based on the original invalidity of the marriage, it is absurd for a court which recognizes that the marriage was originally a valid one to render any such decree.³ A recent decision of the New York Court of Appeals

¹ See *Ogden v. Ogden*, [1908] P. 46, 78; *Cumington v. Belchertown*, 149 Mass. 223, 226, 21 N. E. 435, 437. This distinction is sometimes overlooked. *Barney v. Cuness*, 68 Vt. 51, 33 Atl. 897; 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 67, 73.

² See *Roth v. Roth*, 104 Ill. 35, 48; 2 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 1596-1609, 13 HARV. L. REV. 112.

³ Courts are sometimes inclined to annul marriages somewhat hastily without much inquiry into the question of their validity by the law which created them. *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521. Where, however, the court is made aware of the legality of the marriage by the *lex loci contractus*, it will generally recog-

annulling a valid ⁴ marriage performed in New Jersey between persons resident in New York seems therefore erroneous.⁵ *Cunningham v. Cunningham*, 206 N. Y. 341.

If, however, a court is of the opinion that no real marriage ever took place,⁶ it is perfectly rational for it to declare this opinion. It then becomes necessary to decide whether such a declaration can conclusively establish the proposition that the marriage status never did exist. The truth of this proposition depends upon a fact, whether or not a sovereign has created that status. If he has done so then the status has existed, and if a status were a natural object, no sovereign could expect that his declaration that he had not created it would be regarded as conclusive by other sovereigns who were convinced of its untruth. Marriage has existence as a *res*, however, only because the law recognizes it as such, and the law may treat its own creations in ways in which it would be absurd for it to deal with external objects.⁷ The canon law, from which our law of marriage is derived, has always treated marriage as capable of annulment,⁸ and therefore a state which derives its conception of marriage from the canon law must admit that some sovereign has jurisdiction to determine once and for all whether the marriage has

nize its validity and refuse to annul it. *Bater v. Bater*, [1906] P. 209. Cf. *Medway v. Needham*, 16 Mass. 157; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193.

⁴ The court suggests that the marriage may have been made voidable by a New Jersey statute. 2 N. J. GEN. STAT. 2005. This suggestion is contrary to a *dictum* of the New Jersey court. *Pearson v. Howey*, 11 N. J. L. 12, 20. It is also contrary to the interpretation which most other courts have put upon similar statutes. *Goodwin v. Thompson*, 2 Greene (Ia.) 329; *Parton v. Hervey*, 1 Gray (Mass.) 119. But cf. *Shaffer v. Ohio*, 20 Oh. 1.

⁵ New York would apparently have had jurisdiction to divorce the parties, but the decree purports to be one of annulment, and want of age is not a ground for divorce by New York law. See N. Y. CODE CIV. PROC., §§ 1742-1774. New York might also refuse to give effect to a marriage which it regarded as opposed to public policy. *Kinney v. Commonwealth*, 30 Gratt. (Va.) 858. But since this would produce the undesirable result that persons who are man and wife in one state are practically strangers in another, it should only be resorted to in extreme cases. See *Medway v. Needham*, 16 Mass. 157, 159; *State v. Ross*, 76 N. C. 242, 247. Furthermore, in annulling the marriage, the court is attempting more than merely to make it ineffectual in New York.

⁶ This may be due to the fact that the apparent marriage was void or that it was voidable. A void marriage has no existence and a decree of annulment is not necessary to invalidate it. *Patterson v. Gaines*, 6 How. (U. S.) 550. It is, however, desirable that the parties should not be left to determine at their peril whether or not they are married, and accordingly decrees of annulment are universally rendered in the case of void marriages. *Johnson v. Kincaid*, 2 Ired. Eq. (N. C.) 470; *Rawdon v. Rawdon*, 28 Ala. 565. The prior validity of a voidable marriage, on the other hand, is not open to attack except in annulment proceedings. *Sutton v. Warren*, 10 Metc. (Mass.) 451; 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION, §§ 259-292.

⁷ This principle that the law which creates rights can later declare that they never existed is not unknown to the common law. Thus a lawful entry may be converted into trespass *ab initio*, a freedom from liability into liability from the outset by ratification, title in A. into title in B. by relation back and the like. These examples differ from annulment only in that the latter affects a *res* and not a personal right, and that the doctrine of relation back is there made the basis for the determination of the rights of the parties by municipal law, whereas in annulment the theory is invoked to give a sovereign jurisdiction to decide a question as against all the world.

⁸ *Aughtie v. Aughtie*, 1 Phillim. 201; *Chick v. Ramsdale*, 1 Curt. Ecl. 34. That canon law annulment is a decree *in rem* is clear. *Perry v. Meddowcroft*, 10 Beav. 122. See *Harrison v. Mayor of Southampton*, 4 DeG. M. & G. 137, 151.

existed in the past. The sovereign who created the marriage is the most natural one for the law to clothe with such jurisdiction. The question being whether or not he has done something, it is more reasonable to expect others to take his word for it than to ask him to take the word of another as conclusive. Furthermore, the decision of the question involves the determination of the previous state of his law, as to which he has the most authoritative information. There is, no doubt, a certain hardship in forcing the parties to return to the place where the marriage ceremony occurred to discover whether or not they are really married. If, however, the sovereign of the domicile is impressed with this hardship he can dissolve by a decree of divorce the foreign marriages of his citizens which he believes to be void. Moreover, whatever may be desirable from the point of view of the parties, it seems impossible to conceive of international law as insisting that one sovereign shall allow another to determine for him what his acts have been.

The cases offer very little assistance in determining whether or not this view can be regarded as correct. By the weight of authority no decree of nullity which is not based on the law that created the marriage will be recognized by the courts which administer that law.⁹ Beyond this no theory of the requisites for jurisdiction has been definitely worked out. There is a tendency, however, in the courts of the state where the parties reside,¹⁰ as well as those where the marriage has been created,¹¹ to assert jurisdiction.

THE NATURE AND EFFECT OF DURESS. — If a person's hand be taken forcibly and compelled to hold a pen and write, it cannot be said that the writing is his act, since there is no expression of the will.¹ But where an act is compelled by threats only it seems impossible to contend that the act done is not the act of the person threatened; he in fact consents to do the act rather than submit to the alternative threatened.² Accordingly it is generally held that a contract or a deed executed under duress is voidable rather than void,³ and that duress is of no avail against

⁹ *Simonin v. Mallac*, 2 Sw. & Tr. 67; *Cummington v. Belchertown*, *supra*; *Ogden v. Ogden*, *supra*. *Contra*, *Roth v. Roth*, *supra*.

¹⁰ Jurisdiction was held to exist on the ground of domicile or residence in the following cases: *Johnson v. Cooke*, [1898] 2 Ir. 130; *Roberts v. Brennan*, [1902] P. 143; *Roth v. Roth*, *supra*; *Barney v. Cuness*, *supra*; *Avakian v. Avakian*, *supra*. See also *Bater v. Bater*, [1906] P. 209, 220. The Irish and Illinois decisions are perhaps based on the theory that the law of the domicile creates the marriage. The Vermont case rests on the supposed similarity between annulment and divorce. The other decisions are apparently due to the theory that it is inconvenient to force the parties to return to the state of creation to have their status determined.

¹¹ The following cases hold that the state where the marriage took place has jurisdiction. *Sottomayer v. De Barros*, 3 P. D. 1; *Linke v. Van Aerde*, 10 T. L. R. 426; *Ogden v. Ogden*, *supra*. In one case the court which created the marriage denied its own jurisdiction to annul it. *Blumenthal v. Tannenzholz*, 31 N. J. Eq. 194.

¹ See HOLLAND, *ELEMENTS OF JURISPRUDENCE*, 8 ed., 93, 94.

² *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596. See TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW*, 67, 68.

³ *National Bank v. Wheelock*, 52 Oh. St. 534.

an innocent obligee,⁴ or against a *bonâ fide* purchaser of a negotiable instrument⁵ or land.⁶

Though an act committed under duress be a legal act, it does not follow that there should be attached to it all the consequences which would ordinarily attend such an act.⁷ Criminal liability, which ordinarily follows certain acts, may not follow these acts if committed under duress.⁸ And it is obviously unjust to allow an obligee who by duress induces a contract to hold the obligor. Formerly the common law was very strict in limiting the class of threats which would constitute duress sufficient even for the avoidance of the contract. Duress *per minas* was confined to "fear of loss of life, of loss of member, of mayhem, of imprisonment."⁹ Clearly only pressure of the gravest description should serve as justification for a crime.¹⁰ And where the act done affects third parties it seems reasonable that the duress which should furnish an excuse for the act must be severe.¹¹ But as between the parties there seems no basis for such stringency. The modern American view has given to duress in such cases a much broader application, including fear of less serious personal wrongs,¹² and of the exercise of unlawful control of property,¹³ such pressure being regarded as sufficient to overcome the will of a person of ordinary firmness.¹⁴ It is probable that when an external standard is applied it is meant that the alternative threatened must be so burdensome to the average man as to cause a man of ordinary resistance to submit.¹⁵ And further, there is a tendency to disregard the external standard, and to allow the contract to be avoided if the alternative be so disagreeable because of the peculiarity of the individual that it exerts an amount of pressure on him sufficient to cause his submission.¹⁶ The most reasonable view would seem to be, that, given a threat of improper action and a contract induced by it, there should in every case be grounds of avoidance. Otherwise the person exercising the threat is allowed to profit by his own wrong.

⁴ *Fairbanks v. Snow*, *supra*. Cf. *Rogers v. Adams*, 66 Ala. 600. See BACON'S ABRIDGMENT, DURESS, B.

⁵ *Clark v. Pease*, 41 N. H. 414; *Lane v. Schlemmer*, 114 Ind. 296, 15 N. E. 454. See 9 HARV. L. REV. 57, 58. But cf. *Barry v. Equitable Life Assurance Society*, 59 N. Y. 587.

⁶ *Defuty v. Stapleford*, 19 Cal. 302.

⁷ See HOLLAND, ELEMENTS OF JURISPRUDENCE, 8 ed., 94.

⁸ *Rex v. Crutchley*, 5 C. & P. 133.

⁹ See 2 COKE, INSTITUTES, 483; BACON'S ABRIDGMENT, DURESS, A. Blackstone's definition of duress does not include fear of imprisonment. See 1 BL. COMM. 130.

¹⁰ *Respublica v. M'Carty*, 2 Dall. (U. S.) 86.

¹¹ It seems doubtful whether duress of any description is a defense to an action of tort. See HOLMES, THE COMMON LAW, 148, 149.

¹² See *Foshay v. Ferguson*, 5 Hill (N. Y.) 154, 158.

¹³ *Oliphant v. Markham*, 79 Tex. 543, 15 S. W. 569; *Spaids v. Barrett*, 57 Ill. 289. The English cases refuse to recognize duress of property as ground for avoiding a contract. *Atlee v. Backhouse*, 3 M. & W. 633; *Skeate v. Beale*, 11 A. & E. 983. But they allow a recovery of money paid to obtain property wrongfully detained. *Oates v. Hudson*, 6 Exch. 346. See WILLISTON, WALD'S POLLOCK ON CONTRACTS, 731, 732.

¹⁴ See *Miller v. Miller*, 68 Pa. 486, 493; *Spaids v. Barrett*, *supra*; *United States v. Huckabee*, 16 Wall. (U. S.) 414, 431, 432.

¹⁵ See *Galusha v. Sherman*, 105 Wis. 263, 274, 81 N. W. 495, 499.

¹⁶ Cf. *Galusha v. Sherman*, 105 Wis. 263, 280, 281, 81 N. W. 495, 501; *Silsbee v. Webber*, 171 Mass. 378, 50 N. E. 555.

Under any theory the threat must be improper or there would be no reason for a defense, regardless of the amount of pressure exerted. A recent case holds that the threat of prosecution for a crime in fact committed constitutes such duress as to justify the avoidance of the contract. *Wilbur v. Blanchard*, 126 Pac. 1069 (Idaho). Some courts have held that since the prosecution is lawful no wrong is threatened and hence there is no duress.¹⁷ Others, however, in accord with the principal case, have decided, it would seem correctly, that such a threat affords sufficient grounds for avoiding a contract induced thereby.¹⁸ For although the alternative threatened, the prosecution itself, is not illegal, still such a use thereof is improper as a manifest perversion of the machinery of the criminal law to a purpose for which it was not intended.

DELEGATION OF THE TAXING POWER. — Perhaps no principle is more characteristic of our political system than the doctrine that there shall be no taxation without representation.¹ Long and bitter controversies between the people and the Crown made this a fundamental rule of English law.² Accordingly, after the American Revolution the states uniformly adopted constitutions which vested the taxing power primarily in legislative bodies.³ But the refusal of Parliament to recognize the logical development of this doctrine, that only the local legislature should impose the local taxes, had been one of the chief causes of the Revolution.⁴ As a logical consequence it has uniformly been held that the power to tax for local purposes and within local boundaries may be properly delegated to municipal corporations.⁵ Many states have so provided in their constitutions.⁶ With this exception, however, the taxing power,

¹⁷ *Eddy v. Herrin*, 17 Me. 338; *Compton v. Bunker Hill Bank*, 96 Ill. 301.

¹⁸ *Morse v. Woodworth*, 155 Mass. 233, 29 N. E. 525; *Hartford Fire Ins. Co. v. Kirkpatrick*, 111 Ala. 456, 20 So. 651. These cases are readily distinguishable from the case where a settlement of a debt is made to escape civil imprisonment for the debt. *Clark v. Turnbull*, 47 N. J. L. 265. It is generally held that the doctrine of *in pari delicto* does not apply where one of the parties acted under duress. *Bryant v. Peck and Whipple Co.*, 154 Mass. 460, 28 N. E. 678. See WILLISTON, *WALD'S POLLOCK ON CONTRACTS*, 503. *Contra*, *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287.

¹ See 1 COOLEY, *TAXATION*, 3 ed., 99; GRAY, *LIMITATIONS OF THE TAXING POWER*, § 534. This does not go so far as to exempt the property of women, children, and non-residents from taxation because they have no vote. See *Thomas v. Gay*, 169 U. S. 264, 276, 18 Sup. Ct. 340, 345. In the District of Columbia, also, the exclusive power of Congress includes the power to tax. *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521; *Bowman v. Ross*, 167 U. S. 548, 17 Sup. Ct. 966.

² *Bate's Case*, 2 Cobbett's State Trials, 371; *Hampden's Case*, 3 Cobbett's State Trials, 825.

³ For a collection of these provisions see GRAY, *LIMITATIONS OF THE TAXING POWER*, §§ 583-615.

⁴ See 1 COOLEY, *TAXATION*, 3 ed., 96.

⁵ See *Vallenty v. Board of Park Commissioners*, 16 N. D. 25, 32, 111 N. W. 615, 618; *State v. Mayor, etc. of Des Moines*, 103 Ia. 76, 82, 72 N. W. 639, 641.

⁶ The following constitutions, for example, provide that the power may be delegated to "corporate authorities": Cal., Colo., Idaho, Ill., Mo., Mont., Neb., S. C., S. D., Utah, Wash., W. Va. See GRAY, *LIMITATIONS OF THE TAXING POWER*, §§ 560-563*a*. Several states have also provided in their constitutions that questions of taxation may

since it is entrusted to the legislature in its fiduciary capacity as the representative of the people, cannot be delegated.⁷ Of course the legislature may leave purely ministerial duties incident to levying and collecting taxes to an executive officer or commission. It need only prescribe the rule by which the tax is to be assessed and the circumstances under which it is to be gathered.⁸ Thus a federal revenue act which allowed the President under fixed conditions to suspend its provisions for the free importation of certain articles, and named the duties to be levied thereon during such suspension, was held not to involve a delegation of legislative authority.⁹ Similarly a statute which provided that a foreign corporation seeking to do business in the state must pay an amount equal to that imposed by existing or future laws in the state of its origin upon foreign corporations there, has been held not to delegate the taxing power to a foreign legislature.¹⁰ The amount of the tax to be imposed need not be specified, if the rules are given by which it can be calculated.¹¹ But the legislature may not fix a maximum and minimum rate and delegate to an executive commission the power to assess a tax between these limits.¹² The assessment of a betterment tax, however, according to the modern view is an administrative function.¹³

In considering to what sort of municipal corporations the taxing power may be delegated, the general principle in the absence of special constitutional provisions seems to be that the authority may be given to local bodies of a legislative character, though courts in their desire to sustain legislation have created many exceptions.¹⁴ Thus taxing powers cannot be given to the trustees of a public library,¹⁵ or charitable society,¹⁶ or to a board of park,¹⁷ police,¹⁸ or drainage¹⁹ commissioners who have not been elected by the community to be taxed. A recent decision upheld an act delegating such powers to the directors of a school district appointed by the courts. *Minsinger v. Rau*, 84 Atl. 902 (Pa.). Three of the seven judges, however, dissented, taking the sounder view that delegation to a non-elective board is not within an exception based on the doctrine that local taxes should be assessed by local representatives.²⁰ Probably

be submitted to a popular vote. See GRAY, LIMITATIONS OF THE TAXING POWER, §§ 545-547.

⁷ *Vallley v. Board of Park Commissioners*, *supra*; *State v. Mayor, etc. of Des Moines*, *supra*; *Inhabitants of the Township of Bernards v. Allen*, 61 N. J. L. 228, 39 Atl. 716.

⁸ *Terrel v. Wheeler*, 123 N. Y. 76, 25 N. E. 329.

⁹ *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495.

¹⁰ *People v. Fire Association of Philadelphia*, 92 N. Y. 311; *State v. Insurance Co. of North America*, 115 Ind. 257, 17 N. E. 574.

¹¹ *Terrel v. Wheeler*, *supra*.

¹² *State v. Ashbrook*, 154 Mo. 375, 55 S. W. 627.

¹³ *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125; *Arnold v. Mayor, etc. of Knoxville*, 118 Tenn. 195, 90 S. W. 469. But *cf.* *Parks v. Board of Commissioners*, 61 Fed. 436; *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 151, 36 S. W. 1041.

¹⁴ See GRAY, LIMITATIONS OF THE TAXING POWER, §§ 554, 555.

¹⁵ *State v. Mayor, etc. of Des Moines*, *supra*.

¹⁶ *Fox v. Mohawk and Hudson River Humane Society*, 165 N. Y. 517, 59 N. E. 353.

¹⁷ *State v. Leffingwell*, 54 Mo. 458; *People v. Mayor of Chicago*, 51 Ill. 17; *Vallley v. Board of Park Commissioners*, *supra*.

¹⁸ *Hinze v. People*, 92 Ill. 406.

¹⁹ *Von Cleve v. Passaic Valley Sewerage Commission*, 71 N. J. L. 574, 60 Atl. 214; *Harward v. Drainage Commissioners*, 51 Ill. 130.

²⁰ *Cf.* *Willis v. Owen*, 43 Tex. 41; *McCabe v. Carpenter*, 102 Cal. 496, 36 Pac. 836;

elected directors could exercise the power.²¹ The contention of counsel, however, that the act violated the federal Constitution, seems unsound, for the federal courts will not take jurisdiction to enforce a "republican form of government."²² Nor do they seem to regard an improper delegation of the taxing power as a violation of the Fourteenth Amendment.²³

RIGHT TO STRIKE TO UNIONIZE THE EMPLOYMENT. — Though labor unions logically constitute combinations in restraint of trade, the modern system of business organization renders them so essential to further the proper interests of workmen that they are no longer treated, in this country at least, as illegal.¹ Any attempt to enforce demands by striking, if it does not involve a breach of contract or is not accompanied by a tort against an employer, creates no liability in his favor,² regardless of motive.³

But a strike to coerce the employer into exercising his right to discharge a workman involves the further element of an interference with the workman's right to a free market for his labor. That the workman has this right is shown in the cases giving him an action where the strike involves a tort against the employer.⁴ Moreover, when a fourth party is brought into the dispute, as in the case of a secondary boycott, the invasion of the right is usually held a tort, seldom if ever justified.⁵ In every case, since the invasion of the workman's right by the right of the union member to quit work has injured the workman, it should be treated as a *prima facie* tort, with the burden upon the union member to show that his right should prevail.⁶

Where, however, no fourth party is involved, the tort may often be justifiable. Thus a strike may be called without liability to procure the discharge of a fellow workman whose system of labor or incompetency prejudices⁷ or endangers⁸ the strikers. It is also within the limits of

Schultes v. Eberly, 82 Ala. 242, 2 So. 345. The effect of these authorities is weakened by special constitutional provisions in the respective states. But see Valley v. Board of Park Commissioners, 16 N. D. 25, 32, 111 N. W. 615, 618; State v. Mayor, etc. of Des Moines, 103 Ia. 76, 82, 72 N. W. 639, 641, and note the emphasis placed by the courts upon the fact that these boards were not elected by the people to be taxed.

²¹ See Valley v. Board of Park Commissioners, *supra*.

²² Pacific States Tel. & Tel. Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224.

²³ Cf. Soliah v. Heskin, 222 U. S. 522, 32 Sup. Ct. 103; Fallbrook Irrigation District v. Broadley, 164 U. S. 112, 17 Sup. Ct. 56.

¹ See 25 HARV. L. REV. 465.

² Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663; Karges Furniture Co. v. Amalgamated, etc. Union, 165 Ind. 421, 75 N. E. 877. *Contra*, Mapstrick v. Range, 9 Neb. 390, 2 N. W. 739.

³ See COOKE, COMBINATIONS, MONOPOLIES, AND LABOR UNIONS, 2 ed., § 59. But see 18 HARV. L. REV. 411, 418.

⁴ Cf. Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106; Jonas Glass Co. v. Glass Bottle Blowers' Association, 72 N. J. Eq. 653, 66 Atl. 953.

⁵ Cf. Crump v. Commonwealth, 84 Va. 927, 6 S. E. 620; Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753.

⁶ De Minico v. Craig, 207 Mass. 593, 94 N. E. 317. See 20 HARV. L. REV. 253, 262.

⁷ Minasian v. Osborne, 210 Mass. 250, 96 N. E. 1036.

⁸ See Berry v. Donovan, 188 Mass. 353, 357, 74 N. E. 603, 605; MARTIN, MODERN LAW OF LABOR UNIONS, §§ 36, 37.

justifiable competition to strike to obtain an employee's work by his discharge.⁹ But a strike to enforce a debt owed by the workman to the union is not competition,¹⁰ since in a fair sense no interest in regard to the employment is protected by his discharge. In a recent case the court refused to enjoin a union from striking to compel the discharge of workmen who refused to affiliate with the union. *Kemp v. Division No. 241, Amalgamated Association of Street and Electric Ry. Employees of America*, 255 Ill. 213, 99 N. E. 389. In such a case where the strike benefits primarily not the union members but the union itself it is regarded as unjustifiable in many jurisdictions.¹¹ But in the exigencies of modern business organization the union is an instrumentality in the workmen's hands, essential to make their competition effectual. Strengthening it, therefore, enlarges their power to secure such direct benefits as shorter hours and increased pay. Consequently a strike for unionization would seem justifiable. Three of the four majority justices in the principal case, however, base their decision upon the theory that the union has committed no tort and needs no justification, a view that has much support.¹²

The result in the principal case should not be affected by the fact that the aggrieved employees were ex-members of the union, who resigned because they disapproved of certain of its actions. It is true that unless a union admits all applicants fulfilling reasonable requirements for membership, it should not be allowed the excuse of unionization.¹³ For it should not be heard to say that the strike is for unionization when the most effectual way to strengthen the union, enlargement of membership,¹⁴ is rejected. But where the question is not wrongful refusal of membership, but wrongful expulsion, or resignation because of improper action, different considerations prevail. The wrongfully expelled member can compel reinstatement because of his right to share in the union funds.¹⁵ All illegal practices of the union can be enjoined. If an ex-member stays outside merely by preference, he should have no more rights than any outsider. Even if the union's actions are reprehensible in nature, but without legal redress, the union's right to compel unionization should not fail. The justification should not depend upon the union's moral uprightness any more than the legality of a strike for higher wages depends upon the reasonableness of the rates asked.

⁹ *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753.

¹⁰ *Giblan v. National, etc. Union*, [1903] 2 K. B. 600. See 17 HARV. L. REV. 140.

¹¹ *Lucke v. Clothing Cutters' Assembly*, 77 Md. 396, 26 Atl. 505; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011; *Ruddy v. United Association of Journeymen Plumbers*, 79 N. J. L. 467, 75 Atl. 742; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327. But cf. *Mayer v. Journeymen Stone Cutters' Association*, 47 N. J. Eq. 519, 20 Atl. 492.

¹² *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Cleonmitt v. Watson*, 14 Ind. App. 38; *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369.

¹³ The decisions in *Lucke v. Clothing Cutters' Assembly*, 77 Md. 396, 26 Atl. 505, and *Quinn v. Leatham*, [1901] A. C. 495, might be based on this ground.

¹⁴ See 20 HARV. L. REV. 253, 347.

¹⁵ *Weiss v. Musical Mutual Protective Union*, 189 Pa. St. 446, 42 Atl. 118; *Meurer v. Detroit Musicians' Benevolent & Protective Association*, 95 Mich. 451, 54 N. W. 954.

EQUITABLE SUBSTITUTION OF MORTGAGES.—A party advances money with which a first mortgage is removed and accepts a new mortgage of the same property as security. There is an outstanding judgment against the mortgagor. Should the judgment be allowed to operate as a first lien on the mortgagor's property, or is the new mortgagee equitably entitled to priority? This question was answered in two recent cases, in both of which the courts proceeded on the theory of subrogation. One court considered the new mortgagee a volunteer and not entitled to the position of the original mortgagee. *Nelson v. McKee*, 99 N. E. 447 (Ind.). The other reached a contrary result. *Frederick v. Gehling*, 137 N. W. 998 (Neb.).¹

The frequent statement that a mere volunteer is not entitled to subrogation is confusing and probably unsound.² What persons are volunteers is a matter of great uncertainty.³ The term is usually applied to any person who is refused subrogation.⁴ But it is not necessarily applicable to one who becomes surety against the expressed will of the debtor.⁵ Moreover, the doctrine of equitable substitution is clearly not confined to cases where one party pays the debt of another under compulsion, as in the case of a surety; or for self-protection, as in the case of a subsequent incumbrancer. But it is extended in favor of a party who paid the debt acting under a mistake,⁶ or induced by fraud.⁷ Furthermore, an agreement for substitution is recognized, and if not expressed is freely implied.⁸ It is also settled that purchasers at a void judicial sale, whose money is used to pay off valid claims against the property, are equitably entitled to the position of the claimants.⁹ The same is true where the sale was by a mortgagee under a power.¹⁰ And where a party advances money with which a valid mortgage is removed and takes a defective mortgage on the same property as security, he is equitably entitled to have the valid mortgage reinstated for his benefit.¹¹ The same principle applies in cases analogous to those under

¹ The decision in this case may be reconciled with the other. See *infra*, p. 273. The value of the property, which was sold to the judgment creditor on execution, was sufficient to satisfy both claims, and since the amount of the mortgage was deducted in the appraisalment, it was properly chargeable to the purchaser as part of the price. Otherwise, the sale could have been vacated. See 2 FREEMAN, EXECUTIONS, §§ 284, 309.

² Cf. 13 HARV. L. REV. 297.

³ Cf. BISPHAM, PRINCIPLES OF EQUITY, § 337; SHELDON, SUBROGATION, § 245.

⁴ Cf. 6 POMEROY, EQUITABLE REMEDIES, § 921, n. 86.

⁵ *Mathews v. Aikin*, 1 N. Y. 595.

⁶ *Butler v. Rice*, 103 L. T. R. 94. By the better view, it makes no difference whether the mistake is one of fact or of law. *Coudert v. Coudert*, 43 N. J. Eq. 407. *Contra*, *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267.

⁷ *Bolman v. Lohman*, 74 Ala. 507; *Zinkeison v. Lewis*, 63 Kan. 590, 66 Pac. 644.

⁸ *Tradesmen's Building, etc. Association v. Thompson*, 32 N. J. Eq. 133; *Home Savings Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161; *Gans v. Thieme*, 93 N. Y. 225.

⁹ *Davis v. Gaines*, 104 U. S. 386; *Dutcher v. Hobby*, 86 Ga. 198, 12 S. E. 356; *Bruschke v. Wright*, 166 Ill. 183, 46 N. E. 813; *Hunter v. Hunter*, 63 S. C. 78, 41 S. E. 33. Cf. *Vasser v. City of Liberty*, 50 Tex. Civ. App. 111, 110 S. W. 119; *Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466; 10 HARV. L. REV. 453.

¹⁰ *Brewer v. Nash*, 16 R. I. 458, 17 Atl. 857; *Givens v. Carroll*, 40 S. C. 413, 18 S. E. 1030.

¹¹ *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. 453; *Hughes v. Thomas*, 131 Wis. 315, 111 N. W. 474; *Homeopathic Mutual Life Ins. Co. v. Marshall*, 32 N. J. Eq. 103.

discussion where a first mortgagee accepts a new mortgage which although not defective is subsequent in time to another incumbrance.¹² The result should be the same where the new mortgagee is a third party who furnished money to remove the first mortgage.¹³

Equitable substitution is invoked in these cases¹⁴ simply as an appropriate means of preventing unjust enrichment. It has no technical requirements.¹⁵ It is believed that the judgment creditor in both cases under discussion was unjustly enriched. As a matter of substance the transaction was a substitution of the new mortgage in the place of the old mortgage, and the mere form of the transaction should not be the basis of equitable priority. The security of the judgment creditor should not be advanced at the expense of the mortgagee. It is not enough to justify equitable substitution that the judgment creditor would be left in no worse position, but it is submitted that the doctrine should be applied to prevent the judgment creditor from enjoying an inequitable advantage. If the mortgagee paid the judgment creditor money under a mistake, it would be unconscionable for the judgment creditor to insist upon his legal title to the money. The unjust enrichment in the present case, although not so palpable is none the less real. The argument that the new mortgagee was negligent in not looking up the record of the judgment¹⁶ and that the judgment creditor had an equal equity confuses the doctrine of purchaser for value without notice with the doctrine of equitable substitution for the prevention of unjust enrichment.

ASSUMPTION OF RISK AS A DEFENSE WHERE THE NEGLIGENCE IS A BREACH OF A STATUTORY DUTY. — The doctrine of assumption of risk, although most often arising in cases between master and servant, is not confined to such cases, nor to those where the parties are in contractual relation to each other.¹ But in many situations where one person would ordinarily have a duty to abstain from or prevent an injury to another, this duty may be removed if the person to whom the duty is owed voluntarily and appreciating all the facts subjects himself to the danger.²

¹² *Bruse v. Nelson*, 35 Ia. 157; *Campbell v. Trotter*, 100 Ill. 281; *Geib v. Reynolds*, 35 Minn. 331; *Wooster v. Cavender*, 54 Ark. 153, 15 S. W. 192.

¹³ *Tyrrell v. Ward*, 102 Ill. 29, 16 HARV. L. REV. 525. Cf. *Tradesmen's Building, etc. Association v. Thompson*, *supra*; *Home Savings Bank v. Bierstadt*, *supra*; *Bruse v. Nelson*, *supra*. *Contra*, *Fort Dodge Building and Loan Association v. Scott*, 86 Ia. 431, 53 N. W. 283; *Mather v. Jenswold*, 72 Ia. 550, 32 N. W. 512, 34 N. W. 327. Cf. *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374. See *Holt v. Baker*, 58 N. H. 276, for a case where an intervening incumbrancer relied upon the discharge of the first mortgage.

¹⁴ For other cases see 1 JONES, MORTGAGES, §§ 874-885.

¹⁵ See *Merchants' and Miners' Transportation Co. v. Robinson-Baxter-Dissosway Towing and Transportation Co.*, 191 Fed. 769, 772.

¹⁶ *Fort Dodge Building and Loan Association v. Scott*, *supra*; *Mather v. Jenswold*, *supra*.

¹ *Plott v. Wilkes*, 3 B. & Ald. 304; *Rase v. Minneapolis, St. P. & S. S. M. R. Co.*, 107 Minn. 260, 120 N. W. 360.

² Such intelligent choice of a dangerous situation, whereby the performance of a duty of protection is waived is entirely distinct from contributory negligence, which does not remove the duty but merely affords a defense. See *Thomas v. Quartermaine*, 18 Q. B. D. 685, 697, 702.

When a statute renders an employer liable criminally if he fails to provide safe appliances for his employees, it is considered to impose also an absolute tort duty to the employees, so that a failure to act is negligence *per se*.³ By the weight of authority, this duty cannot be waived.⁴ In a recent case a statute made criminal the failure of a factory owner to guard machinery. The plaintiff was injured by such failure under circumstances in which at common law he would have assumed the risk. The court held that a servant could not assume the risk of the master's failure to perform this statutory duty. *Fitzwater v. Warren*, 206 N. Y. 355. Most of the courts maintaining this view reach the result on the theory that assumption of risk is based upon contract, and that an express or implied contract not to sue the master for an injury resulting from a violation of the statute is illegal and void.⁵ It is considered that the purpose of the statute will not be adequately accomplished by its enforcement through the criminal penalty alone.⁶

The theory of illegal contract, while sound so far as it goes, is too limited in its application, because it cannot apply to cases of assumption of risk where the relations are not contractual.⁷ The principle of the doctrine of assumption of risk, expressed in the maxim *volenti non fit injuria*, was recognized even before that of contracts.⁸ It would seem to be an axiomatic rule of justice that a man should not be permitted to act voluntarily to his own detriment and then to put the burden of his folly upon another. Now if the right of the individual to recover involves only his personal interest he may consent to give it up. But if society has an interest in the right then the consent of the individual cannot destroy the right.⁹ Thus a householder cannot waive his exemption because of the social interest that he and his family be not reduced to poverty.¹⁰ An insurance company cannot waive a lack of insurable interest because of the danger to society in tempting the beneficiary to destroy the life or chattel in which he has no interest.¹¹ The importance which the doctrine of assumption of risk acquired in the nineteenth century is an example of the individualistic theory of justice on which the common law of that period proceeded, allowing each man to work out his own salvation. But statutes prescribing criminal liability for failing to guard machinery are enacted to protect the interest which society has that its members be not maimed.¹² The principal case, in

³ *Green v. American Car & Foundry Co.*, 163 Ind. 135, 71 N. E. 268; *McGinty v. Waterman*, 93 Minn. 242, 101 N. W. 300.

⁴ *Narramore v. Cleveland, C., C. & St. L. Ry.*, 96 Fed. 298; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E. 371; *Murphy v. Grand Rapids Veneer Co.*, 142 Mich. 677, 106 N. W. 211; *Baddeley v. Earl Granville*, 19 Q. B. D. 423.

⁵ The leading case in this country maintaining this theory is *Narramore v. Cleveland, C., C. & St. L. Ry.*, *supra*; and its reasoning has been generally followed.

⁶ But *cf.* *Osterholm v. Boston, etc. Mining Co.*, 40 Mont. 508, 107 Pac. 499.

⁷ *Cf.* *Hott v. Wilkes*, *supra*; See *Osterholm v. Boston, etc. Mining Co.*, 40 Mont. 508, 525, 107 Pac. 499, 504.

⁸ A recognition of the principle is found even in the writings of Homer (ILIAD, 4, 43), and of Aristotle (EUDEMEAN ETHICS, Bk. V, c. xi).

⁹ This idea has been incorporated in some statutes. See GA., CODE, 1911, § 10.

¹⁰ *Moxley v. Ragan*, 10 Bush (Ky.) 156.

¹¹ *Saddlers Co. v. Badcock*, 2 Atk. 554.

¹² See *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149, 154, 64 N. E. 610,

overruling an earlier New York decision¹³ construing the same statute, illustrates the increasing inclination of the courts to-day to recognize this interest of society.¹⁴ The employee's consent by an assumption of the risk to give up a right involving such an interest should not be effective whether such consent be worked out contractually or otherwise.

RECENT CASES.

ADMIRALTY — TORTS — DAMAGES RECOVERABLE FROM ONE OF TWO VESSELS AT FAULT. — A steamship collided with a barge which was being towed by a tug. The steamship and tug were both at fault. The owners of the barge sued the steamship and recovered full damages. *Held*, that the judgment should be affirmed. *The Devonshire*, 107 L. T. R. 179 (H. L.).

For a discussion of the decision of the lower court, see 25 HARV. L. REV. 183.

AGENCY — RATIFICATION OF UNAUTHORIZED CONTRACTS — CONTRACT OF INSURANCE RATIFIED AFTER OCCURRENCE OF LOSS. — A contract of insurance was made on behalf of the plaintiff without authorization, but the premium was not paid. *Held*, that the plaintiff may ratify the contract after he knows of loss. *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 475 (C. C. A., Second Circ.).

This decision reverses a holding which followed *Kline Bros. v. Royal Ins. Co.*, 192 Fed. 378, previously decided in the lower court. For a criticism of that case, see 25 HARV. L. REV. 729.

BANKRUPTCY — PROVABLE CLAIMS — CLAIM AGAINST BANKRUPT INDORSER OF NOTE MATURING AFTER THE FILING OF THE PETITION: EFFECT OF PARTIAL PAYMENT AT MATURITY BY MAKER. — The indorser of certain promissory notes became insolvent, and a petition in bankruptcy was filed before the maturity of the notes. At maturity part payment was made on the notes by the maker. *Held*, that the holder may prove for the entire amount of the notes. *In re Simon*, 197 Fed. 105 (Dist. Ct., W. D. N. Y.).

Under the Bankruptcy Act of 1898 there is no express provision for the discharge of contingent liabilities. By the earlier decisions under this act it was held that claims founded on such liabilities could not be proved. *Goding v. Rosenthal*, 180 Mass. 43, 61 N. E. 222. *In the matter of McCauley*, 2 N. B. N. Rep. 1085. And it is well settled that when a claim is so uncertain because of a contingency as to make any calculation of its value practically impossible, such claim is not provable. *Dunbar v. Dunbar*, 190 U. S. 340, 23 Sup. Ct. 757. Although the liability of an indorser is not determinable before maturity, it has been held by a liberal construction of § 63 *a* (4) of the act, which provides for proof of a claim founded upon a contract express or implied, that claims against a bankrupt indorser may be proved when the notes mature after the filing of the petition but before the expiration of the time for proving claims. *Moch v. Market Street National Bank*, 107 Fed. 897; *In re Semmer Glass Co.*, 135

611; *Lore v. American Manufacturing Co.*, 160 Mo. 608, 621, 61 S. W. 678, 682. See also 20 HARV. L. REV. 111.

¹³ *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986.

¹⁴ An exposition of the way in which judicial reasoning will be affected by the changes of general opinion will be found in *Smart v. Smart*, [1892] A. C. 425, 432. This attitude on the part of the courts shows a capacity in the common law to adjust itself to changing conditions.

Fed. 77. See 23 HARV. L. REV. 636. In such cases the value of the claim should be determined by the liability as fixed. See *In re Smith*, 146 Fed. 923, 926. The liability of the indorser becomes fixed only to pay the amount unpaid by the maker at maturity after due notice. It would seem, therefore, that the holder in the principal case should have been required to reduce his claim by the amount of the payments.

BANKS AND BANKING — EFFECT OF PAYMENT THROUGH CLEARING-HOUSE. — A check indorsed by the defendant was sent through the clearing-house and charged against the drawee bank. The bank paid up the balance at the clearing-house, but being notified of the drawer's insolvency, returned the check before the close of the banking day, without having debited the drawer's account. *Held*, that this constitutes a dishonor of the check. *Columbia-Knick-erbocker Trust Co. v. Miller*, 48 N. Y. L. J. 670 (N. Y. Sup. Ct.).

In the New York clearing-house checks are canceled off and the net credits and liabilities adjusted with the clearing-house at about one o'clock. By its constitution, errors are rectified between the banks themselves, and money is immediately refunded for bad checks returned on the same banking day. Thus the payment through the clearing-house is only a conditional payment, which becomes absolute at the end of the banking day if the drawee bank has not returned the check, or by some unequivocal act, such as debiting the drawer's account, affirmatively ratified the payment. *Manufacturers' National Bank v. Thompson*, 129 Mass. 438; *Atlas National Bank v. National Exchange Bank*, 176 Mass. 300, 57 N. E. 605. See MORSE, BANKS AND BANKING, 4 ed., § 349. In the principal case the cause of refusal arose after the check was debited in the clearing-house. The clearing-house agreement, however, does not state that the cause of refusal must exist before that time, but simply gives an option to return until the close of the banking day. It would be inconvenient to find out in each case exactly when the cause of refusal arose. There is nothing to prevent the law from giving full effect to the intention of the parties.

CONFLICT OF LAWS — MARRIAGE — JURISDICTION FOR NULLIFICATION. — A marriage ceremony was performed in New Jersey between parties resident in New York, one of whom was under eighteen years of age. A statute made such a marriage voidable if performed in New York. In New Jersey the marriage, although forbidden, was probably valid. *Held*, that the New York court has jurisdiction to annul the marriage. *Cunningham v. Cunningham*, 206 N. Y. 341. See NOTES, p. 253.

CONSTITUTIONAL LAW — CONTEMPT OF COURT — POWER OF LEGISLATURE TO REGULATE PUNISHMENT FOR CONTEMPT. — A state statute provided that punishment for contempt should not exceed a fine of \$50 or imprisonment for ten days. A court created by the constitution imposed a fine in excess of that allowed by the statute. *Held*, that the statute does not violate the state constitution. *Ex parte Creasy*, 148 S. W. 914 (Mo., Sup. Ct.).

Courts created under constitutions almost unanimously assert their inherent power to punish for contempt. *Easton v. State*, 39 Ala. 551. See *State v. Morrill*, 16 Ark. 384, 388. But see *Ex parte Hickey*, 12 Miss. 751, 776-780. The cases apparently conflict only as to whether the legislature can regulate that power. Some courts refuse to recognize such regulation on the ground that it is inconsistent with their inherent power to punish. *Railway Co. v. Gildersleeve*, 219 Mo. 170, 118 S. W. 86; *Burke v. Territory*, 2 Okl. 499, 37 Pac. 829. The principal case, however, follows the view that the power can be regulated. *In re Gorham*, 129 N. C. 481, 40 S. E. 311. See *Wyatt v. People*, 17 Colo. 252, 261, 28 Pac. 961, 964. A third view allows procedural regulation only. *Mahoney v.*

State, 33 Ind. App. 655, 72 N. E. 151. See *Little v. State*, 90 Ind. 338, 340. The logic of the first view seems inevitable. From the very meaning of the term inherent power is incapable of extrinsic regulation. *State ex inf. Crow v. Shepherd*, 177 Mo. 205, 76 S. W. 79; *Hale v. State*, 55 Oh. St. 210, 45 N. E. 199. Curiously enough, the courts enunciating the second and third views assent, by way of *dicta*, to the doctrine of inherent power to punish. See *State v. Kaiser*, 20 Or. 50, 56, 23 Pac. 964, 967; *In re Oldham*, 87 N. C. 23, 26; *Hawkins v. State*, 125 Ind. 570, 573, 25 N. E. 818, 819. Yet their holdings can only mean that the power is not inherent. If a restriction of the court's power is desired, it can logically and properly be secured by constitutional limitation. See 13 HARV. L. REV. 615. This reasoning, of course, does not apply to courts created by the legislature, whose powers can properly be regulated by statute. *Ex parte Robinson*, 19 Wall. (U. S.) 505. See *State v. Frew*, 24 W. Va. 416, 459.

CONSTITUTIONAL LAW — POLICE POWER — PROHIBITION OF SALE OF MALT LIQUOR. — The defendant agreed to purchase of the plaintiff company a certain amount of a beverage manufactured by it, which was harmless and non-intoxicating, containing malt but no alcohol. The agreement contemplated resale by the defendant in Mississippi, where a statute prohibited the sale of malt liquors. The defendant repudiated the contract on the ground that it was illegal. The state court held that the statute applied to the beverage in question. The plaintiff contended that the statute was unconstitutional as depriving it of liberty and property without due process of law. *Held*, that the statute is constitutional. *Purity Extract and Tonic Co. v. Lynch*, U. S. Sup. Ct., Dec. 2, 1912.

For a discussion of the principles involved, see 17 HARV. L. REV. 418.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE: DELEGATION OF POWERS — DELEGATION OF THE TAXING POWER TO DIRECTORS OF SCHOOL DISTRICT APPOINTED BY THE COURTS. — A statute authorized the directors of a school district who were appointed by the courts to levy taxes for school purposes. It fixed a maximum and minimum limit, but left the exact sum to be assessed to the discretion of the directors. It was contended that this involved a delegation of power repugnant to the provisions of the Constitutions of Pennsylvania and of the United States. *Held*, that the statute was valid. *Minsinger v. Rau*, 84 Atl. 902 (Pa.). See NOTES, p. 257.

CORPORATIONS — CITIZENSHIP AND DOMICILE OF CORPORATION — CONCLUSIVENESS OF STATEMENT OF LOCATION IN CHARTER. — A state statute provided that the charter of a corporation should state the name of the city or town in which the principal office or place of business was to be located. The plaintiff corporation, to secure a low rate of taxation, named a small town in its charter, though its principal office was in fact in a large city. The city assessed the corporation on its personalty and the corporation sought to enjoin the collection of the tax. *Held*, that the injunction should not be granted. *Inter-Southern Life Ins. Co. v. Milliken*, 149 S. W. 875 (Ky.). *Contra*, *Lloyd's Executorial Trustees v. City of Lynchburg*, 75 S. E. 233 (Va.).

Domicile depends on presence in a place with intent to make it a home. *Mitchell v. United States*, 21 Wall. (U. S.) 350; *De Meli v. De Meli*, 120 N. Y. 485, 24 N. E. 996. Therefore in its primary sense it is applicable only to human beings. See DICEY, *CONFLICT OF LAWS*, 2 ed., 160. But for many purposes, such as taxation, it is important that a corporation should have a fixed and definite location. For this reason statutes often provide that the charter or certificate of incorporation shall state the principal place of business. See MASS. REV. LAWS, SUPP., 1902-1908, p. 877; HURD, *ILL. REV.*

LAWs, 1909, c. 32, § 2. Some courts have held that the statement in the charter is conclusive, even in favor of the corporation. *Western Transportation Co. v. Scheu*, 19 N. Y. 408; *Pelton v. Transportation Co.*, 37 Oh. St. 450. *Contra, Detroit Transportation Co. v. Board of Assessors of City of Detroit*, 91 Mich. 382, 51 N. W. 978; *Woodsum Steamboat Co. v. Sunapee*, 74 N. H. 495, 69 Atl. 577. It is submitted that this construction of a general incorporation act is erroneous because it fails to recognize that the legislature must have intended a truthful statement of location; and that it is objectionable in that it determines the place of taxation without any reference to the facts and directly induces tax evasion. Doubtless the legislature can, if it sees fit, ascribe to a corporation a domicile anywhere within the state. But taxation should not rest on a fictitious basis, and in the absence of a strong legislative intent to the contrary a corporation's principal office should be held to be where it carries on its principal administrative business. *Milwaukee Steamship Co. v. City of Milwaukee*, 83 Wis. 590, 53 N. W. 839; *Woodsum Steamboat Co. v. Sunapee*, *supra*. If, however, a third party acts on the statements in the charter to his detriment, the corporation should be estopped to deny their truth. *People ex rel. Knickerbocker Press Co. v. Barker*, 87 Hun (N. Y.) 341, 34 N. Y. Supp. 269. See *Detroit Transportation Co. v. Board of Assessors of City of Detroit*, 91 Mich. 382, 390, 51 N. W. 978, 980.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — LIABILITY OF DIRECTORS FOR THE COMMISSION OF TORTS FOR WHICH JUDGMENT HAS BEEN OBTAINED AGAINST THE CORPORATION. — The directors of a corporation, to gratify their own personal ends, published in its name a libel wholly outside the legitimate business of the corporation. As a result, a judgment was obtained against the corporation and paid by it. *Held*, that the corporation may recover the amount of the judgment from the directors. *Hill v. Murphy*, 98 N. E. 781 (Mass.).

The court in the principal case adduces as one ground of its decision that the intentional *ultra vires* act of the directors was a breach of duty to the corporation which they owed as quasi-trustees. *Cf. Williams v. McDonald*, 42 N. J. Eq. 392, 7 Atl. 866; *Leeds Estate, etc. Co. v. Shepherd*, 36 Ch. D. 787. Unquestionably directors have frequently been called trustees. *Cobbett v. Woodward*, 5 Sawy. 403. See *In re Exchange Banking Co.*, 21 Ch. D. 519, 535. So also they are often called agents. See *Charitable Corporation v. Sulken*, 2 Atk. 400, 404. Or managing partners. See *Automatic Self-Cleaning Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34, 45. It is clear that they are actually not managing partners. In some instances, however, equity does treat directors as it does trustees; for example, where, after liability in the directors is established, jurisdiction is entertained of the corporation's claim for pecuniary damages. *Fisher v. Parr*, 92 Md. 245, 48 Atl. 621. See *Mason v. Henry*, 152 N. Y. 529, 531, 46 N. E. 837, 839. But since the title to the corporation's property is not in the directors, they are not really trustees. Such expressions are useful merely as indicating points of view from which directors should for the particular purpose be considered. See *Imperial Hydropathic Hotel Co. v. Hempson*, 23 Ch. D. 1, 12. Consequently it would seem incorrect to base a duty on directors as being virtually trustees. But directors are for some purposes actual agents. See *Holmes v. Willard*, 125 N. Y. 75, 79, 25 N. E. 1083, 1084. The principal case might well be decided on the ground of the violation of the duty owed by an agent to his principal.

DEEDS — ATTESTATION — CONSTRUCTION OF STATUTES REQUIRING ATTESTATION. — A statute required certain mortgage deeds to be signed by the mortgagor and attested by two witnesses. The witnesses to such a deed were

not present at the execution but subscribed on the acknowledgment of the mortgagor. *Held*, that this is not a good attestation. *Shamu Patter v. Abdul Kadir Ravuthan*, 16 Calcutta W'kly Notes, 1009 (Eng., Privy Council, July, 1912).

Statutes requiring attestation without more definite stipulation, such as the Statute of Frauds and the statute in the principal case, necessitate a decision whether the word "attest" requires attestation of the signing itself or merely attestation of an acknowledgment by the makers. As to wills, under the Statute of Frauds, the rule was early regarded as settled that attestation of the acknowledgment was sufficient. *Grayson v. Atkinson*, 2 Ves. 454; *Ellis v. Smith*, 1 Ves. Jr. 11. The Statute of Wills expressly provides for such attestation. STAT. 7 WM. IV. & 1 VICT., c. 26, § ix. The rule as to deeds is the same. *Jackson v. Phillips*, 9 Cow. (N. Y.) 93. But a modern tendency to construe the word in the stricter way is shown in decisions on the Bills of Sale Act (41 & 42 VICT., c. 31, § 10 (2)). *Ford v. Kettle*, 9 Q. B. D. 139. See *Sharpe v. Birch*, 8 Q. B. D. 111, 114. The only support for this is in various *dicta* and loose language. See *Burdett v. Spilsbury*, 10 Cl. & F. 340, 417; *Casement v. Fulton*, 5 Moore P. C. 130, 137; *Bryan v. White*, 2 Rob. Eccl. 315, 317; *Roberts v. Phillips*, 4 E. & B. 450, 453. The principal case is in accord with this tendency. But, it is submitted, there is no sufficient reason in justice for the more technical rule. The execution of an instrument would seem to be as well proved by attesting the acknowledgment as the actual signing. See *Jackson v. Phillips*, *supra*, 113.

DOMICILE — DOMICILE OF PERSONS NON SUI JURIS — INTENTION AS TO FUTURE DOMICILE. — A person domiciled in New York decided to settle permanently in Canada, but before he could leave New York he became insane. He was thereafter taken to Canada, where he died some years later. *Held*, that his domicile is in Canada. *In re Robitaille*, 48 N. Y. L. J. 393 (Surrogate's Court, N. Y. County, Oct., 1912).

The result in the principal case was reached from the astonishing premise that since the insanity of the deceased deprived him of the power to change his intention, his intention became fixed, and later concurred with his presence in Canada to establish a domicile. It would seem more correct to say that insanity deprived him of the capacity to have an intention. The holding is clearly inconsistent with the well-settled doctrine that a guardian may change a lunatic's domicile within the state, since on the theory of the principal case there would be an unalterable intention to remain at the existing domicile. *Hill v. Horton*, 4 Dem. Surr. (N. Y.) 88; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20. It is clear that actual presence at a place coupled with an intention to make a home there in the future is insufficient to establish a domicile. *Plant v. Harrison*, 36 N. Y. Misc. 649, 74 N. Y. Supp. 411; *State Savings Association v. Howard*, 31 Fed. 433. The same result should follow if an actual presence is combined with a past intent. The requirements of domicile should be found in fact and not by fiction. It might be argued in the principal case that there should be a presumption in favor of the jurisdiction of the Canadian court which had already admitted the will to probate. But see *Sullivan v. Kenney*, 148 Ia. 361, 375, 126 N. W. 349, 354. For a further discussion of the principles of domicile, see 22 HARV. L. REV. 220; 23 *id.* 211.

DURESS — RECOVERY OF MONEY PAID UNDER THREAT OF CRIMINAL PROSECUTION. — The plaintiff, compelled by a threat of the defendant to prosecute him for larceny, settled a claim of the defendant's for the goods stolen from the latter. He now sues to recover the money paid under the settlement. *Held*, that he can recover the amount paid in excess of the value of the goods. *Wilbur v. Blanchard*, 126 Pac. 1069 (Idaho). See NOTES, p. 255.

ELECTIONS — ELIGIBILITY OF JUDGE FOR NOMINATION TO OFFICE BEGINNING AFTER HIS TERM. — A judge while holding office was nominated for governor, the term to begin two days after his term as judge expired. The state constitution made a judge ineligible for any other public office during the term for which he was elected. *Held*, that the nomination is void. *State ex rel. Reynolds v. Howell*, 126 Pac. 954 (Wash.).

About half the courts construe the word "ineligible" to mean unqualified for nomination to office. *Demaree v. Scates*, 50 Kan. 275, 32 Pac. 1123; *Smith v. Moore*, 90 Ind. 294; *State ex rel. Taylor v. Sullivan*, 45 Minn. 309, 47 N. W. 802. As there is no fixed legal meaning, the ordinary meaning should be regarded. LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION, § 390. It would seem that the ordinary meaning is incompetency for office. Even a court requiring competency for nomination would also require a competency at the time of taking office. If only those over thirty are eligible for a given office, this surely would not prevent a man of twenty-nine from running for it if his thirtieth birthday would come before the date of taking office. It may be argued that public policy opposes a judge running for office. But such reasoning would only apply if there was clearly ambiguity in the words, when it might be used to show the meaning which must have been intended by the makers. The meaning of eligibility, however, seems unambiguous. Competency for office may properly include a requirement of an ability at the time of nomination to be competent for a position when the time arrives. The term of office of a judge under the Washington constitution continues until his successor is elected and qualified. WASH. CONST., Art. 4, § 5. The two terms, therefore, might overlap. As the defendant cannot regulate this circumstance, he is not legally competent for the office of governor until that chance is settled.

EVIDENCE — REAL EVIDENCE — PHYSICAL EXAMINATION OF PLAINTIFF IN PERSONAL INJURY SUIT. — In an action for malpractice based upon two separate operations the plaintiff voluntarily exhibited a portion of her body upon which one of the operations was performed. The defendant requested that he be permitted through his physicians to examine the other part operated on. *Held*, that it was error to refuse this request. *Booth v. Andreas*, 137 N. W. 884 (Neb.).

It is held by the weight of authority that a court has discretionary power to compel one suing for physical injuries to exhibit the injured part of his body, on the ground that any right to personal immunity is subject to the demands of justice. *Schroeder v. Chicago, R. I. & P. Ry. Co.*, 47 Ia. 375; *Richmond & D. Ry. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602. See 4 WIGMORE, EVIDENCE, § 2220. *Contra*, *Union Pacific v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000. But even in jurisdictions not ordinarily compelling such exhibition it is held that when the plaintiff has voluntarily exhibited his injury his right to immunity is to that extent waived. *Chicago, R. I. & T. Ry. Co. v. Langston*, 19 Tex. Civ. App. 568, 47 S. W. 1027; *Winner v. Lathrop*, 67 Hun (N. Y.) 511, 22 N. Y. Supp. 516. This waiver would not seem properly to extend to an injury distinct from that which had been voluntarily exhibited. The principal case in effect holds that these injuries were in fact a single transaction. See NEB. CIV. CODE, § 339.

EXECUTORS AND ADMINISTRATORS — RIGHTS, POWERS, AND DUTIES — RIGHT OF AN EXECUTOR TO PLEAD STATUTE OF LIMITATIONS TO HIS PERSONAL DEBT TO THE ESTATE. — Petitions were filed against the defendants as executors of an estate, alleging that debts from them due to the testator had not been listed. The defendants were refused leave to amend by pleading that the Statute of Limitations had run before the testator's death, and an appeal

was taken. *Held*, that the appeal be dismissed. *Long v. Long*, 84 Atl. 375 (Md.).

The appeal in the principal case was prematurely brought, but the court laid down the rule that an executor can never plead the Statute of Limitations to his own debts to the estate. Such broad language appears in one other case. *Thompson v. Thompson*, 77 Ga. 692, 3 S. E. 261. But there it is probable, and in the cases it cites it is clear, that the statute had not run at the testator's death. *Ingle v. Richards*, 28 Beav. 366; *Juillard v. Orem's Ex'rs*, 70 Md. 465, 17 Atl. 333. Where the statute had run before the testator's death it has been assumed that it could be pleaded. *Haines v. Haines' Ex'rs*, 15 Atl. 839 (N. J.). The theory of the cases is that equity presumes that to be done which should be done, and considers the debts turned into assets in the executor's hands. *Tarbell v. Jewett*, 129 Mass. 457. See 23 HARV. L. REV. 391. A court influenced by the old dislike of the Statute of Limitations might even hold a debt already barred to be assets. But to-day this dislike seems to have passed. See *Pritchard v. Howell*, 1 Wis. 131, 136; *Campbell v. Haverhill*, 155 U. S. 610, 617, 15 Sup. Ct. 217, 220. Furthermore, the evidence as to the original debt in the principal case would be more than six years old, a condition which the statute is designed to prevent. It is submitted that a rule of equity giving to legatees the same rights as the testator should not be construed to give them greater rights.

EXEMPLARY DAMAGES — EVIDENCE OF DEFENDANT'S WEALTH. — In an action of assault and battery, to aid the jury in assessing punitive damages the plaintiff offered evidence tending to show the defendant's reputed wealth. *Held*, that such evidence is admissible. *Bogue v. Gunderson*, 137 N. W. 595 (S. D.).

The assessing of punitive damages over and above that claimed by way of compensation has been very generally adopted, "for the sake of example, and by way of punishing the defendant." S. D., REV. CIV. CODE, § 2292; *Simpson v. Rail Roads*, 1 Wallace, Jr., 164; *Grable v. Margrave*, 4 Ill. 372. The great weight of authority holds that evidence of the defendant's wealth is admissible in determining such damages. *Greeneberg v. Western Turf Association*, 140 Cal. 357, 73 Pac. 1050; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. Unfair discrimination against wealth naturally suggests itself as an argument against this result. But, since the object is to inflict on the particular defendant punishment of a desired degree of stringency, proportioning the fine to his income is obviously desirable. Penal statutes make no such discrimination, but it cannot be doubted that judges, in assessing fines, often consider the wealth of the defendant. The dissenting cases are also influenced by the fear of diverting the attention of juries from the nature of the act and of unfairly privileging insolvent defendants. *Givens v. Berkley*, 108 Ky. 236, 56 S. W. 158; *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 So. 503. But such a danger should only exclude evidence when its relevancy is small. In the principal case, compensation being no longer in question, the issue has narrowed into what assessment upon the wealth of the particular defendant will best effect present punishment and future example.

FEDERAL COURTS — JURISDICTION — ENJOINING PROCEEDINGS IN STATE COURTS. — The plaintiff gas company sued in the federal courts to enjoin the enforcement of an unconstitutional ordinance, imposing a fine for failure to maintain a certain pressure. During the pendency of this suit, the city began proceedings in the state courts to compel the plaintiff to lower its rates. *Held*, that the city will not be enjoined by the federal court from proceeding in the state courts. *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500 (Dist. Ct., W. D. Mo.).

The statute prohibiting a federal court from enjoining suits in state courts

applies only to suits pending at the time the federal action is brought. *U. S. COMP. STAT.*, 1901, § 720; *Dietzsch v. Huidekoper*, 103 U. S. 494. If jurisdiction first attaches in the federal court it will enjoin subsequent proceedings in a state court which would defeat the jurisdiction. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441; *Starr v. Chicago, R. I. & P. Ry. Co.*, 110 Fed. 3; *aff'd in Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398. It seems clear, however, that issues not directly decided by the federal court can subsequently be passed upon by the state court. *Buck v. Colbath*, 3 Wall. (U. S.) 334; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119. Whether or not the second suit is an infringement on the federal jurisdiction seems to depend on whether the federal judgment could be pleaded as *res judicata*. See *Harkrader v. Wadley*, *supra*, 168. This plea will only bar suits on questions necessarily decided in the first case. *Sargent v. New Haven Steamboat Co.*, 65 Conn. 116, 31 Atl. 543. If the suit is begun in the state court before the federal suit is terminated, the state suit can be temporarily enjoined if it appears that it may interfere with the ultimate decree of the federal court on the above principle. *Wagner v. Drake*, 31 Fed. 849; *French v. Hay*, 22 Wall. (U. S.) 250. As the reasonableness of the rates was hardly one of the issues to be decided in the principal case, the court correctly refused to enjoin the suit to reduce them.

INSURANCE — RIGHTS OF BENEFICIARY — CHANGE OF BENEFICIARIES: WHEN CHANGE IS CONSIDERED COMPLETE. — The insured took out a life insurance policy with the defendant, naming his wife as beneficiary. By its terms he had the right to change the beneficiary by filing with the defendants written notice, the change to take effect upon the indorsement of the same on the policy by the company. The insured sent notice that the plaintiff was to be made the beneficiary but died before it reached the defendants. *Held*, that the plaintiff may recover. *Mutual Life Ins. Co. v. Lowther*, 126 Pac. 882 (Colo.).

Equity's jurisdiction to afford relief from accident being limited, it will not aid mere intention without substantial performance. *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Ireland v. Ireland*, 42 Hun (N. Y.) 212. But in many cases it has been held that where there is no express condition precedent and the insured has substantially complied with the requirements for changing the beneficiary, but is prevented from completing them by death, equity will treat the change as completed. *Berkeley v. Harper*, 3 App. Cas. (D. C.) 308; *Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388. These are principally cases where the real controversy is between two beneficiaries. *Titsworth v. Titsworth*, 40 Kan. 571; *National American Association v. Kirgin*, 28 Mo. App. 80. In analogous cases of defective execution of powers, equity exercises a similar jurisdiction, relieving against the accident of death. *Sayer v. Sayer*, 7 Hare 377. Equity, indeed, will not ordinarily perfect an incomplete gift. But in analogous cases of mistake where property is in dispute between two donees, equity will interfere to give it to the one intended by the donor. *Huss v. Morris*, 63 Pa. St. 367. In the principal case, however, the provision as to the time of taking effect seems a clear condition precedent. *Sheppard v. Crowley*, 61 Fla. 735, 55 So. 841; *Sangunitto v. Goldey*, 88 N. Y. App. Div. 78, 84 N. Y. Supp. 989. *Contra*, *Heydorsf v. Conrack*, 7 Kan. App. 202, 52 Pac. 700. Acts by the insured can hardly amount to substantial performance when the defendant has made an absolute condition for the very purpose of protecting itself against a possible double liability. *Sheppard v. Crowley*, *supra*. Especially is this true where the insurance company, as here, is actually setting up the defense for its own benefit.

JURY — WAIVER OF TRIAL BY JURY: CONSENT TO TRIAL BY FIVE JURORS. — In a trial for assault before a Court of Special Sessions the defendant, after demanding a jury, consented to a panel of five. The lower court, without ref-

erence to the jury's similar verdict, found him guilty. *Held*, that the defendant has waived his right to a jury trial and that the finding of the court is sufficient. *People v. Bent*, 151 N. Y. App. Div. 734, 136 N. Y. Supp. 276.

The old law attached almost superstitious sanctity to twelve as the jury number. TRIALS PER PAIS (anno 1725), 79. The New York constitution perpetuates this jury only in "cases in which it has been heretofore used." N. Y. CONST., Art. 1, § 2. But the jury in the principal case is wholly different, since the New York Court of Special Sessions antedates the constitution and since the right to a jury of six in that court is merely an optional privilege subsequently introduced. *People ex rel. Murray v. Justices*, 74 N. Y. 406. In many cases the waiver of one juror is condemned lest it lead to the waiver of all. *Cancemi v. People*, 18 N. Y. 128. But in the Court of Special Sessions complete waiver is permitted. *People ex rel. Murray v. Justices*, *supra*. Since the defendant may waive the entire jury, and since the inviolable jury of twelve is not in question, the objection to a waiver of the number seems unduly technical. *State v. Wells*, 69 Kan. 792, 77 Pac. 547. Furthermore, the principal case inaccurately finds a consent to waive a jury from acquiescence in a kind of jury which turns out, under the court's holding, to be non-existent at law. But consent is a question of fact, and the defendant's demand for a jury seems absolutely to negative any intent to waive a jury trial.

LARCENY — POSSESSION AND LARCENY — POSSESSION OF ABANDONED CHATTELS. — In an indictment for receiving stolen property, the property was laid in a canal company from whose land the chattels were taken. No evidence was offered that the property had not been abandoned by third parties, or that the canal company had assumed dominion over the chattels. *Held*, that there is not sufficient evidence as to the property in the iron to support a conviction. *Rex v. White*, 7 Cr. App. R. 266 (Eng., Ct. Cr. App.).

Possession of a chattel continues in the possessor until he abandons it or it is taken from him. *Merry v. Green*, 7 M. & W. 623; *Regina v. Townley*, 12 Cox C. C. 59. The owner of realty on which a chattel is abandoned has a right to possession as against a wrongdoer. *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44; *Barker v. Bates*, 13 Pick. (Mass.) 255. But he has no possession by the abandonment *per se*. *Queen v. Clinton*, Ir. R. 4 C. L. 6. *Cf. Bridges v. Hawkesworth*, 21 L. J. Q. B. 75. However, he will be regarded as securing possession by displaying an intention to assume dominion over that class of chattels. *Regina v. Rowe*, 8 Cox C. C. 139. *Cf. Queen v. Finlayson*, 3 N. S. Wales S. C. R. 301. In *Regina v. Rowe* possession of iron was secured by emptying the canal with intent to take out all such chattels. Some such mental element is necessary. *Queen v. Finlayson*, *supra*. But see *Regina v. Riley*, 6 Cox C. C. 88, 92. A landowner does not intend to assume dominion over any chattel that may be abandoned on his land, such as a diseased body or a mad dog. Possession involves liabilities as well as rights. Nor is an intention to receive chattels that are beneficial and reject those that are harmful sufficiently definite. The landowner must foresee the possibility of that kind of chattel coming to his land, and prepare to care for it if necessary. Therefore the principal case rightly required more evidence of possession.

MASTER AND SERVANT — ASSUMPTION OF RISK — EFFECT OF CRIMINAL STATUTE REQUIRING SAFE APPLIANCES. — A statute imposed a criminal liability upon a factory owner who failed to guard specified machinery. The plaintiff, an employee, sued for an injury caused by the neglect of the defendant to guard a set-screw, as required by the statute. The master set up the defense that the servant assumed the risk of the negligence. *Held*, that the defense will not be allowed. *Fitzwater v. Warren*, 206 N. Y. 355. See NOTES, p. 262.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—RELIEF FUND BENEFITS.—An employee on becoming a member of the relief fund department of a railroad company contracted that in the event of his injury the benefits from the relief fund should not be paid until he had executed to the company a release from all damage claims. After an injury the employee executed a release and received accident relief benefits. He thereafter sued for damages. The Federal Employers' Liability Act provided that "every contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall be to that extent void." *Held*, that the employee may recover. *Baltimore & Ohio R. Co. v. Gawinske*, 197 Fed. 31 (C. C. A., Third Circ.).

The court in the principal case recognizes the strong arguments in favor of refusing recovery but declares itself bound by a case decided by the United States Supreme Court. *Chicago, B. & Q. Ry. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259. The statutes involved in the two cases, however, are radically different. 35 U. S. STAT. AT LARGE 66, 1909 Fed. Stat. Ann. 585; IOWA CODE, 1907, § 2071. In the earlier case the Iowa statute clearly showed an intent to allow recovery after acceptance of a relief fund, the only question being as to the constitutionality of such provision. In fact an earlier Iowa employers' liability act which expressly prohibited contracts restricting liability had been amplified in this particular for the very reason that under it the employee could not recover after exercising his option to take the relief fund. *McGuire v. Chicago, B. & Q. Ry. Co.*, 131 Ia. 340, 108 N. W. 902; *Donald v. Chicago, B. & Q. Ry. Co.*, 93 Ia. 284, 61 N. W. 971. It is submitted that the present federal statute does not materially differ from the common-law rule which makes void agreements limiting liability for negligence. *Chicago, B. & Q. Ry. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42; *Leas v. Pennsylvania Co.*, 37 N. E. 423 (Ind. App.). See *RENO, EMPLOYERS' LIABILITY ACTS*, 2 ed., § 12. Furthermore, under other statutes, which are perhaps not quite so broad as the one now under discussion, it has been invariably held that a release given after the injury in consideration of a relief fund is a valid compromise. *Petty v. Brunswick & Western Ry. Co.*, 109 Ga. 666, 35 S. E. 82; *Pittsburgh, C., C. & St. L. Ry. Co. v. Cox*, 55 Oh. St. 497, 45 N. E. 641. The words employed in this statute do not indicate an intent on the part of Congress to force a railroad company to litigate every damage claim in order to purge itself of liability; a fair construction would seem to be that the federal act, like the common law and the state statutes, merely prohibits a railroad company from contracting away liability that may arise from its negligence in the future.

MORTGAGES — PRIORITIES — EQUITABLE SUBSTITUTION.—The intending purchaser of a first mortgage took a new mortgage instead of an assignment of the old. The old mortgage was removed. There was an outstanding judgment against the mortgagor. *Held*, that the owner of the judgment has a first lien on the property of the mortgagor, equitably entitled to priority as against the new mortgage. *Nelson v. McKee*, 99 N. E. 447 (Ind.).

A mortgage was given to secure an advance with which another mortgage prior to a judgment lien was removed. The judgment creditor purchased the property at execution upon the judgment and in the appraisalment the amount of the mortgage was deducted. The judgment creditor brought an action to quiet title against the mortgage on the theory that his judgment was a prior lien. *Held*, that the new mortgage is equitably entitled to priority. *Fredrick v. Gehling*, 137 N. W. 998 (Neb.). See *NOTES*, p. 261.

MUNICIPAL CORPORATIONS — MUNICIPAL DEBTS AND CONTRACTS — LIABILITY FOR SERVICES PERFORMED UNDER VOID CONTRACT.—A city engaged an accountant to audit its books. The contract of service was void for exceed-

ing the debt-contracting power fixed by statute. *Held*, that the accountant cannot recover in quasi-contract. *Haskins v. Oklahoma City*, 126 Pac. 204 (Okl.).

For a discussion of the principles involved, see 17 HARV. L. REV. 343.

OFFER AND ACCEPTANCE — UNILATERAL CONTRACTS — PERFORMANCE CONSTITUTING ACCEPTANCE. — The defendant company offered a share in its profits to any employee who worked a certain length of time, provided he was not discharged before January first. The plaintiff worked the required time, but was discharged on December thirtieth. In a suit for a share in the profits a verdict for the defendant was directed. *Held*, that such direction is error. *Zwolaneck v. Baker Mfg. Co.*, 137 N. W. 769 (Wis.).

When an offer to a unilateral contract is made, the offeror, having the right to dictate his terms, is not bound until every term of his offer has been complied with; and he can revoke before complete performance. *Williams v. West Chicago Street R. Co.*, 191 Ill. 610, 61 N. E. 456; *Biggers v. Owen*, 79 Ga. 658, 5 S. E. 193. Compliance with the terms reasonably to be implied from the offer is, of course, sufficient. *Haskell v. Davidson*, 91 Me. 488, 40 Atl. 330; *Crawshaw v. City of Roxbury*, 7 Gray (Mass.) 374. Some courts, however, have held that part performance by the offeree binds the offeror. *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086; *Louisville & Nashville R. Co. v. Goodnight*, 10 Bush (Ky.) 552. But a bilateral agreement cannot correctly be implied where there is in fact no such agreement. *White v. Corlies*, 46 N. Y. 467; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669. It is submitted, therefore, that the principal case is wrong in considering the company bound by an offer not accepted within its terms. See WILLISTON, WALD'S POLLOCK ON CONTRACTS, 3 ed., 34, n. 39; ASHLEY, CONTRACTS, 78. The reasoning of the court has been influenced by the desire to attain a just result which might well have been reached on other principles. The company, having received an added benefit from the continuous employment, is liable in quasi-contract for the amount of the benefit; and the profits offered would be strong evidence of the value of such benefit. *Fayette County v. Faisin's Executor*, 44 Tex. 585.

PLEDGE — UNINDORSED PROMISSORY NOTE HELD AS COLLATERAL SECURITY : DUTY TO COLLECT. — The payee of a demand promissory note pledged the note as security for a debt. The note, which was not indorsed by the payee, continued in the possession of the pledgee until it was barred by the Statute of Limitations. Thereafter the pledgee sued on the debt. *Held*, that the payee cannot set off the amount of the note. *Muthrukrishnien v. Viraraghava Iyer*, 12 Citator 1046 (Madras, High Ct. of Judicature).

It is clear that under the American rule a negotiable instrument need not be indorsed to create a valid pledge. See *Bridge Co. v. Savings Bank*, 46 Oh. St. 224, 229; JONES, PLEDGES, § 142. A pledgee of negotiable paper is bound to use reasonable diligence in the collection of it. See *Roberts v. Thompson*, 14 Oh. St. 1, 7; *Kiser v. Ruddick*, 8 Blackf. (Ind.) 382, 384. Although in the principal case the pledgee could not sue in his own name as the note was unindorsed, and although there was no assignment, the pledging of the note would seem to be an implied authority to the pledgee to sue in the name of the pledgor. Cf. *Grover v. Grover*, 24 Pick. (Mass.) 261. See *Blazo v. Cochrane*, 71 N. H. 585, 586. Otherwise, as the pledgor has lost the right to the possession, neither party would be able to sue on the note. As the pledgee has failed to exercise this implied power to sue, he should be liable for the resulting loss. Under the English law, however, the decision might be supported as the English courts are less ready than American courts to spell out an implied power to sue. See *Milroy v. Lord*, 4 DeG., F. & J. 264, 276.

REAL PROPERTY — VOLUNTARY PARTITION — WHETHER LIFE TENANTS CAN BIND REMAINDERMEN. — Land was conveyed to five persons during their natural lives as tenants in common, with remainder in fee simple to their heirs, who were to take *per stirpes*. The life tenants entered into a fair and equal voluntary partition. After the death of one of the life tenants his heir sued in ejectment for an undivided fifth of the grantor's property. *Held*, that the partition is binding upon the plaintiff. *Acord v. Beaty*, 148 S. W. 901 (Mo.).

It is a general rule that co-tenants cannot by a partition prejudice the rights of others having independent estates who are not parties to the partition. See *Cole v. Aylott*, Litt. Rep. 299, 300; ALLNAT, LAW OF PARTITION, 63. It would seem to follow that a partition by life tenants or tenants in tail would not be binding upon remaindermen who are not *in esse* at the time of the partition. *Buxton v. Bowen*, 2 Woodb. & M. 365; *Buxton v. Inhabitants of Uxbridge*, 10 Metc. (Mass.) 87. But in the early English law a fair and equal voluntary partition between parceners in tail would bind the issue in tail forever. See COKE ON LITTLETON, 166 a; *Thomas v. Gyles*, 2 Vern. Ch. 232. By reason of the difference in the nature of their estate, it does not necessarily follow that a life tenant can make a permanent partition. But where the co-tenants for life seek division by means of judicial proceedings and not by voluntary partition, it has been often held that remaindermen are bound who are not in court nor even *in esse*. *Gaskell v. Gaskell*, 6 Sim. 643. See *Mead v. Mitchell*, 17 N. Y. 210, 214; *Wills v. Slade*, 6 Vesey 498. This is based upon the equity doctrine of virtual representation, the theory being that the interests of the remaindermen are effectively protected by the parties to the action in whom the present estate is vested. See *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 684 *et seq.*; STORY, EQUITY PLEADINGS, 10 ed. § 145. There seems little reason or expediency in holding that life tenants may not by a fair voluntary partition accomplish that which they could readily attain by an action in court. See *Crowley v. Blackman*, 81 Ga. 775, 777, 8 S. E. 533. Considerations of public policy would also seem to support a partition that cannot be upset at the death of each life tenant.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT — MONOPOLY IN PATENTED ARTICLES. — A patentee licensed eighty-five per cent of the manufacturers of sanitary enameled iron ware to use certain patents in the manufacture of such ware, in return for their agreements to resell their product at fixed prices, and only to those jobbers who agreed to handle the goods of licensed manufacturers exclusively and to maintain non-competitive prices. There was also a provision for rebates in favor of the manufacturers and jobbers so long as they adhered to their agreements. *Held*, that the arrangement constitutes a combination in restraint of trade in violation of the Sherman Anti-Trust Act. *Standard Sanitary Manufacturing Co. v. United States*, U. S. Sup. Ct., Nov. 18, 1912.

For a discussion of the decision in the lower court, see 25 HARV. L. REV. 454. As to the control of a patentee over unpatented articles, see 25 HARV. L. REV. 641.

RIGHT OF PRIVACY — NATURE AND EXTENT OF RIGHT. — The plaintiff employed the defendant to make only a certain number of photographs of the dead bodies of his twin sons, who were born curiously joined together at the shoulders. The defendant without the plaintiff's knowledge or consent made more photographs, filed a copy at the United States copyright office and secured a copyright. *Held*, that the plaintiff may recover damages. *Douglas v. Stokes*, 149 S. W. 849 (Ky.).

In the principal case there seems to be a breach of the express contract by

the photographer. But the court does not so deal with the case, and even apart from such a contract the plaintiff should recover. The earlier cases argued that there was a breach of an implied contract and of a fiduciary relation between the photographer and customer. *Pollard v. Photographic Co.*, 40 Ch. D. 345; *Moore v. Rugg*, 44 Minn. 28, 46 N. W. 141. The relation between a person and his photographer hardly seems of so close and personal a nature as to give rise to fiduciary obligations. In most cases it is reasonable to imply a contract that the photographer shall make no use of the picture. But justice would require a recovery not only where the photograph copyrighted or published is taken by a photographer under agreement but where it is surreptitiously snapped by a stranger. And many courts allow recovery in tort for an interference with the plaintiff's right of privacy. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S. E. 68; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364. Wherever this right has been recognized it would seem to cover such a situation as that in the principal case, and allow recovery in tort as well as in contract.

STATUTE OF FRAUDS — SUFFICIENT MEMORANDUM — UNDELIVERED DEED NOT RECITING THE PAROL CONTRACT. — The defendant, in accordance with the terms of a parol contract, prepared and signed a deed conveying certain land to the plaintiff, but retained the deed in his possession. The deed contained no recital of the parol contract. *Held*, that the deed does not constitute a sufficient memorandum to satisfy the Statute of Frauds. *Lowther v. Potter*, 197 Fed. 196 (Dist. Ct., E. D. Ky.).

The American cases are almost equally divided as to whether delivery of the written memorandum is necessary to satisfy the Statute of Frauds. *Magee v. Blankenship*, 95 N. C. 563; *Johnson v. Brook*, 31 Miss. 17. The more recent cases tend toward the view that the requirements of the statute are fulfilled without delivery. *Johnston v. Jones*, 85 Ala. 286, 4 So. 748. See *Ames v. Ames*, 46 Ind. App. 597, 91 N. E. 509. *Contra*, *Wilson v. Winters*, 108 Tenn. 398, 67 S. W. 800. The reasoning is that the real object of the statute is to prevent fraud by the fabrication of oral evidence against the defendant, and that all possibility of such fraud is eliminated when the defendant himself retains possession of the memorandum. *Drury v. Young*, 58 Md. 546. This reasoning seems sound. It follows that an undelivered deed, if it can properly be called a memorandum, is sufficient to satisfy the statute. See *Jenkins v. Harrison*, 66 Ala. 345, 358, 359. But the statute requires a memorandum of the contract; hence a deed containing no recital of the parol contract does not come within the terms of the statute. *Kopp v. Reiter*, 146 Ill. 437, 34 N. E. 942. *Contra*, *Parrill v. McKinley*, 9 Gratt. (Va.) 1. It may be argued that it is fair to imply a parol contract from the existence of the deed. But this is not a necessary inference. Nor can an undelivered deed be itself construed as a contract to convey, as might be possible in the case of the delivery of an invalid deed.

TAXATION — PROPERTY SUBJECT TO TAXATION — PROPERTY RECEIVED IN LIEU OF DOWER. — The widow of a testator elected to take real estate devised by will in lieu of dower. Under a statute taxing "All property . . . which shall pass by will or by the intestate laws," she claimed exemption for an amount equal to her dower interest. *Held*, that an amount equal to her dower interest is not subject to the tax. *In re Sanford's Estate*, 137 N. W. 864 (modifying former opinion in same case, 90 Neb. 410, 133 N. W. 870).

It is generally held that dower does not pass by will or the intestate laws and is therefore not subject to an inheritance tax. *In re Weiler's Estate*, 122 N. Y. Supp. 608; *Crenshaw v. Moore*, 124 Tenn. 528, 137 S. W. 924. See 25 HARV. L. REV. 181. *Contra*, *Billings v. People*, 189 Ill. 472, 59 N. E. 708. The same is true with respect to curtesy. *In re Starbuck's Estate*, 63 N. Y. Misc. 156,

116 N. Y. Supp. 1030, aff'd in 137 N. Y. App. Div. 866, 122 N. Y. Supp. 584; *In re Green's Estate*, 68 N. Y. Misc. 1, 124 N. Y. Supp. 863. But where the property is taken under the will in lieu of dower, it would seem that the title passes by the will and that therefore the transfer is within the taxing statute. *In re Riemann's Estate*, 42 N. Y. Misc. 648, 87 N. Y. Supp. 731. The principal case, as appears from its reference to the case modified by it, apparently holds that the widow's election to take under the will is a sale to her in exchange for her dower rights, and that such a transaction is not within an act taxing "gifts, legacies, and inheritances," quoting the title of the statute. The text of the act proper, however, is similar to most inheritance tax laws and purports to tax "all property . . . which shall pass by will or by the intestate laws." NEB. LAWS, 1901, c. 54, § 1; 2 COBBEY, NEB. ANN. STAT., 1909, § 11,201. It is submitted that even a sale is within this statute if the title to the property sold passes by will. Cf. *In re Gould's Estate*, 156 N. Y. 423, 51 N. E. 287. As the widow chooses to exchange her dower interest for the beneficial devise under the will, it seems just to make her take the incumbrance with the benefit.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — SATISFACTION OF MORAL OBLIGATION. — In 1795 the New York legislature provided for the purchase from the Cayuga Indians of specified lands at 50 cents per acre and their immediate resale at \$2 per acre. In 1909 the legislature voted to pay to the Indians the profits on this transaction. *Held*, that this is a proper exercise of the taxing power. *People ex rel. Cayuga Nation of Indians v. Commissioners of Land Office*, 137 N. Y. Supp. 393 (Sup. Ct., App. Div.).

A contractor agreed with a city to build a sewer under water at a unit price for materials used. Later, at the contractor's request, the city allowed him to build it dry, which resulted in the use of fewer materials. After the contractor had failed in a suit on the contract the city council voted to pay him what he would have received under the original method. *Held*, that this is an improper exercise of the taxing power. *Longstreth v. City of Philadelphia*, 69 Legal Int. 598 (Pa., C. P., Phila. County, Aug. 27, 1912).

It seems well settled that the satisfaction of certain merely moral claims on the public will be a sufficiently public purpose to justify taxation. For instance, a pension for old employees of the state is justifiable. *Trustees of Exempt Firemen's Benevolent Fund v. Roome*, 93 N. Y. 313. Cf. *Opinion of the Justices*, 175 Mass. 599, 57 N. E. 675. The waiver of technical defenses is also allowed. *People ex rel. Blanding v. Burr*, 13 Cal. 343; *New Orleans v. Clark*, 95 U. S. 644. Further, officers may be indemnified for torts incident to their employment. *Messmore v. Kracht*, 137 N. W. 549 (Mich.). See 21 HARV. L. REV. 625. Beyond these instances the law is chaotic. The difficulty seems one of ethics rather than law, the determination of what is a moral claim. In determining this question the legislature should have a large discretion. See *Opinion of the Justices*, 175 Mass. 599, 603, 57 N. E. 675, 677; 21 HARV. L. REV. 277. The result in the New York case is obviously just. The Pennsylvania case seems in conflict with a Massachusetts decision. *Friend v. Gilbert*, 108 Mass. 408. But the conclusion reached is indisputable. It is difficult to see what moral claim a man can have against a city which merely abides by the terms of a fairly made contract. An opposite course by the city, also, would directly encourage inefficiency. But a different result is reached in the case of a voluntary payment by a city for services received under an illegal contract. *Vare v. Wallon*, 84 Atl. 962 (Pa.).

TRADE UNIONS — STRIKES — RIGHT TO STRIKE TO COMPEL DISCHARGE OF NON-UNION EMPLOYEE. — Certain members of an incorporated trade union resigned because its funds were expended in support of a political campaign.

The union then sought to procure the discharge of the ex-members by threatening a strike, none of the workmen being under any contract of service. The ex-members brought a bill for an injunction against the union's action. *Held*, that the injunction will not be granted. *Kemp v. Division No. 241, Amalgamated Association of Street and Electric Ry. Employees of America*, 255 Ill. 213, 99 N. E. 389. See NOTES, p. 259.

WATERS AND WATERCOURSES — NATURAL WATERCOURSES: RIPARIAN RIGHTS — FLOOD WATERS. — The defendants proposed to divert for irrigation purposes on non-riparian lands the surplus water from a stream during seasons of unusual floods. The diversion would inflict no present damage on the plaintiffs who were lower riparian proprietors. *Held*, that the defendants cannot be enjoined. *Gallatin v. Corning Irrigation Co.*, 126 Pac. 864 (Cal.).

A riparian owner has no property in the water of natural watercourses but a right of user as it passes along. This right is subject to similar rights of all the riparian owners and must therefore be reasonable. *Embrey v. Owen*, 6 Exch. 353. If there is an unreasonable use of the water no damage to the lower owner need be shown. *Roberts v. Gwyrfa District Council*, [1899] 1 Ch. 583; *Blodgett v. Stone*, 60 N. H. 167. The principal case purports to follow a previous California decision holding that the lower riparian proprietor must show actual damage where even the natural flow of the river is diverted. *San Joaquin, etc. Irrigation Co. v. Fresno Flume & Irrigation Co.*, 158 Cal. 626, 112 Pac. 182. The court here in its language goes to the further extent of holding that the lower riparian owner has no right whatever in flood waters. It may be said that this result is supportable even at common law on the ground that flood waters are not properly to be considered part of the natural flow, and should be treated as surface waters. But flood waters have been held not to be surface waters. *O'Connell v. East Tennessee, V. & G. Ry. Co.*, 87 Ga. 246. It seems, therefore, that this is another example of the tendency of western courts to break away from strict common-law rules by limiting the rights of riparian owners, in order to meet local conditions. *Cf. Clough v. Wing*, 17 Pac. 453 (Ariz.). See 1 CAL. L. REV. 11.

WILLS — INCORPORATION BY REFERENCE — WHAT WORDS ARE SUFFICIENT. — The testatrix by her will gave certain property to the plaintiff "to dispose of in accordance with my instructions to her." After the death of the testatrix a letter was found in her handwriting addressed to the plaintiff and containing instructions for the disposition of the property. *Held*, that the letter could not be incorporated into the will. *Magnus v. Magnus*, 84 Atl. 705 (N. J.).

The rule adopted by the great weight of authority in both England and America is merely that a definite reference to an extrinsic document as in existence, and proof that the document was in existence when the will was executed, is sufficient to allow incorporation into the will. *Allen v. Maddock*, 11 Moore P. C. 427; *Baker's Appeal*, 107 Pa. 381. The principal case, however, lays it down as an absolute requirement that the reference must be to the document as existing. This, it is submitted, is an unnecessary restriction. If the reference is such as to render the document capable of identification, but the words used could refer equally to a future as well as to a past document, it would seem that parol evidence should be admissible to show that the testator actually did refer to an existing document. Such a rule would not be inconsistent with the general rule that a will, to be effective, must purport to be a final disposition at the time of its execution. But if the reference is too indefinite to render the document capable of identification, as it seems to be in the principal case, there should be no incorporation. The New York courts apparently have entirely repudiated the doctrine of incorporation. *Matter of Emmons'*

Will, 110 N. Y. App. Div. 701, 96 N. Y. Supp. 506. See 19 HARV. L. REV. 528. Connecticut, also, has questioned the doctrine. See *Phelps v. Robbins*, 40 Conn. 250, 272.

BOOK REVIEWS.

THE WORLD'S LEGAL PHILOSOPHIES. By Fritz Berolzheimer. Translated from the German by Rachel Szold Jastrow, with an Introduction by Sir John MacDonell and by Albert Kocurek. Boston: The Boston Book Company. 1912. pp. liv, 490.

The method which the author has proposed for his survey of the varied doctrines comprised under the broad term "philosophy of law" is that of presenting "the successive cultural stages in terms of their distinctive ideas, principles, conceptions, and doctrines, and of their practical issues and demands." The titles of the main chapters suggest at once these stages. The first quarter of the book treats "Origins of Oriental Civilization," "The Ancient Commonwealth" (Greece), "The Civic Empire of Ancient Rome," "The Bondage of Mediævalism." The central portion portrays modern progress as a process of emancipation: first, "Civil Emancipation," with its central conception of natural law; second, "Emancipation of the Proletariat." The last third of the work is given to recent "Sociological Reconstruction of Legal Philosophy." "The history of legal philosophy is essentially the history of the great political movements of liberation, of the emancipation of humanity."

Surely here are great chapters in human life! At first one might find it incredible that, as Sir John MacDonell says in his introduction, "American and English lawyers rarely discuss" these subjects and that problems of this literature have for them "little interest." How can it be that lawyers, of all men, "do not inquire into the justification of coercion"? "do not examine into the relations of economics to law"? "do not deal with the proper province of the state"? It would seem scarcely to need saying that this "whole attitude has become untenable," and that "in times such as these of changes profoundly affecting all parts of law, it is essential to go back to principles, and he who would not be the mere *leguleius* must be the philosophic jurist" (pp. xxvii, xxviii). Or if we consider that the starting-point of the philosophy of law is the "conception of justice, or at least of what satisfies the sense of justice," again it would seem inexplicable that any lawyer could neglect such a study.

And yet great as are the themes considered, it is not unlikely that many a lawyer sincerely desirous of broadening his horizon will feel somewhat baffled as he reads this work. Difficulties will confront him, due in part to the condensation of the subject matter, and in part to the terminology. Any such survey as Dr. Berolzheimer makes must choose between saying something about every or nearly every author, and presenting only the outstanding figures and the great lines of development. Dr. Berolzheimer wisely decides for the second plan, but one may well query whether his work would not be even more valuable for most readers if he had followed it more rigorously. There are vistas, but there are also many stretches where one sees trees rather than the forest. Many doctrines seem meaningless except as one brings to them a larger knowledge of their implications than the brief space allotted them suffices for. And besides the condensation there are the technical terms. A caviler might say that a lawyer could not lawfully object to technicality. But our own technicalities may easily seem enough, and those of another subject a burden too great to be readily assumed. Most of the authors considered approached the philosophy of law from the angle of philosophy rather than from that of law.

It is rare that we meet a Grotius, or a Bentham, or a von Ihering. This makes the task of presentation to readers of the legal profession the more difficult. And besides the necessary technicalities there are needless ones. German philosophy in particular has built up a language of its own, of which Dr. Berolzheimer justly complains.

But in spite of these difficulties, largely inherent in the nature of the material, the reader who works through the shell will find plenty of meat. For he is reflecting on the questions of justice in company with the great thinkers of all time. It is a pleasure to record the author's grasp of the larger principles of the development traced. The significance of the economic schools is lucidly interpreted. As the survey approaches the present and affords fuller treatment of recent or living authors it is possible to give more adequate statements of doctrines. The criticisms are incisive. The accounts of such writers as Kohler, von Ihering, and Stammler should be welcomed by many to whom these authors have not been accessible. But the great significance of such a genetic account of legal philosophies is that it tends to weaken our confidence, that we know what justice is. It shows not only how this or that act has been variously judged, but how the very idea of justice itself has changed. As the various absolutisms of the church, the nobility, the monarch, the law, have followed in order, and as successive classes have one by one gained emancipation, the "natural," or "reasonable," or "just" was inevitably affected. To grasp this is the antecedent of such broader views as the Editorial Committee aims to secure by the publication of the series of translations in which this is Vol. II.

Apart from questions of perspective and terminology there are some qualifications as to adequacy of treatment which I mention dogmatically, prefacing them with the obvious remark that no writer covering so wide a field can be expected to be equally successful with all parts of it. In this case, as is natural, English authors are less adequately treated than German. With Locke, it does not follow that because he was an empiricist in his theory of knowledge his philosophy of law proceeds upon an empirical basis. It is misleading to say that Bentham "champions an epicurean, individual type of utilitarianism," for although his psychology of motives was hedonistic his life-long activity as a reformer of the law and his goal, "the greatest happiness of the greatest number," make the term "epicurean" inappropriate. (Incidentally, it will seem to most English readers disproportionate to allot the Pythagoreans three pages and Bentham two). Spencer's whole treatise on Justice which contains the matured attempt of its author to deduce legal principles from biological laws is not referred to. To point out the philosophy, implicit if not explicit, in Blackstone would also seem desirable.

The translation appears to be excellent. It does not read like a translation. The only general suggestion which I should make is that in the citations from such writings as those of Kant, Fichte, Hegel, Schopenhauer, of most of which we have good translations, the references should be to these and not to the originals which are presumably not so accessible to the user of a translated text.

By such works as this the way will be prepared for what would seem a still more desirable undertaking. A survey neither of the philosophies as such, nor of the law by itself, but of the philosophy *in* the law.

J. H. T.

THE COURTS, THE CONSTITUTION, AND PARTIES. Studies in Constitutional History and Politics. By Andrew C. McLaughlin. Chicago: The University of Chicago Press. 1912. pp. vii, 299.

This volume is composed of five papers or addresses given by the author upon various recent occasions, dealing with the topics indicated in its title. Two of them are careful historical discussions of the origin of the American

doctrine that courts can declare acts of the legislature void; a third shows the influence of theories of political philosophy upon the ante-bellum controversy regarding the nature of the Union; and the remaining two consider the significance of American political parties and their real function in popular government.

To the reviewer the two papers first mentioned seem to be contributions of great and permanent value to the discussion of their topic, and perhaps the most important since Professor Thayer's well-known essay upon the subject. The theory of social compact and the earnest desire to limit government by some power outside of itself, both inherited by the colonial Englishmen of the eighteenth century from their political forebears of the Rebellion in England, are convincingly shown to have been the really effective influences in launching and sustaining the doctrine that an unconstitutional act of the legislature may be disregarded by the courts. As becomes a sound lawyer, as well as a careful historian, Professor McLaughlin does not fail to point out what current discussions commonly ignore, that this is conceived as no duty peculiar to the courts but that it rests equally upon all other officers of government, or, for that matter, upon all individuals within the jurisdiction. They, as well as the judges, are under an obligation not to violate the constitution, though bidden to do so by the legislature, and, under the Anglo-American principle of the supremacy of law over even governmental action which infringes private rights, public officers are individually liable for the violation of any law applicable to their acts, including of course the supreme law, the Constitution. Thus was realized in some fashion the dream of those who sought to impose ordered limitations upon government itself, and chiefly through the medium of the courts because their judicial function compelled them to decide finally, as between individuals, controversies about the meaning of constitutions. Dreams change with the centuries, and if to-day the ideal of the right of society to act for the collective good begins to dim the older vision of the right of the individual to be protected from the tyranny of government, that is no good reason for misreading history.

Professor McLaughlin's book, tracing the ancestry of the political ideals of the Revolution, and Professor Beard's recent article, "The Supreme Court — Usurper or Grantee,"¹ investigating the individual views of the framers of the federal Constitution, have replaced plausible conjecture with tolerable certainty regarding two important phases of the question to which they relate.

The style of all of these essays is easy and delightful and their argument sane, thoughtful, and persuasive. The ones discussing political parties are marked by a quiet humor, and disclose glimpses of the author's political philosophy that tempt one to hope he may before long elaborate it further.

J. P. H.

HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS, OR THE SCIENCE OF CASE LAW. By Henry Campbell Black. St. Paul: West Publishing Company. 1912. pp. xv, 768.

This is a full and laborious treatment of a subject of considerable practical importance never before covered by a treatise. The work falls into four parts: (1) Decisions and *dicta*; (2) The doctrine *stare decisis* and the binding effect of precedents; (3) The modern doctrine of "law of the case"; (4) The effect of precedents in the state courts upon decisions in the federal courts.

The treatment of the last two parts is thorough and apparently well done. No other book can so well direct the investigator to the law on the novel and important questions discussed. The first half of the book cannot be so highly

¹ Political Science Quarterly (March, 1912).

praised. The discussion of decision and *dictum* hardly adds to the classic discussion by Professor Wambaugh. So far as one can see, the author comes to his material without prior first-hand knowledge of the problem. In the paragraph headed "Judicial decisions as law or evidence of law" he treats a question over which legal thinkers have been in dispute for generations as if a single reference to Austin and a sentence from Pollock were enough to dispose of the matter. In dealing with precedents in English law the author relies on Markby's somewhat crude opinion that the decisions of the earlier judges were used "as indicating the custom of England, and not as authority"; though Sir Frederick Pollock has long since vouched very early authority to prove the force of precedent in the fourteenth century. In dealing with precedents in the modern civil law he relies on a passage from Dillon, who is hardly a primary authority on the point. It is of course currently said that precedents are of no authority and never cited in court in countries governed by the civil law of Europe. But the reports of decisions in countries governed by the civil law during the last century are probably greater in number than those of England and America combined; and as to Mexico, which he says "has no regular reports or records of adjudged cases," one American library alone contains one hundred and sixty-eight volumes of such reports, and is far from complete. Spain, from which the Mexican law is derived, so far from giving no force to precedents, gives far more than we do; for every decision which stands at all receives an official sanction which gives it the force of statute.

These criticisms, however, are all directed at a comparatively unimportant part of the work. It may be said in general that the treatise covers an important portion of the law not hitherto covered by any treatise, and does it well.

J. H. B.

A SUMMARY OF THE LAW OF TORTS. By John W. Salmond. Being An Abridgment for the Use of Students of the Same Author's Treatise on the Law of Torts. London: Stevens and Haynes. 1912. pp. xxii, 320.

THE LAW OF TORTS. By John W. Salmond. Third Edition. London: Stevens and Haynes. 1912. pp. xxx, 548.

If a type of legal literature is to be developed for the relief of students seeking "to take an examination in a book without reading it," the reader's interest not less than the author's indicates the latter as the maker of his own abridgment. But American students with a less contracted aim will gain nothing by Mr. Salmond's "Summary," for neatly and skilfully as the work of compression is done it is all pure loss. The larger book is none too large. Indeed Mr. Salmond has adhered so strictly to his declared purpose of making it a "compendium of legal principles" that its statements sometimes tend to bareness, and the reader finds himself wishing for the fuller expression of views which he has good reason to know would be both valuable and interesting.

A new edition of the larger treatise, coming less than two years after the second, is added evidence of its deserved popularity. It has lately been made the accredited text-book in the subject for the LL.B. examination in Cambridge, and the esteem in which it is held on this side of the Atlantic is indicated by the award of the Ames Prize to Mr. Salmond in 1910.

In the third edition, as in the second, the changes from the earlier edition (noticed in 22 HARV. L. REV. 69) have not been great, but the work of revision has evidently been done with care, and there are some interesting additions. The author recants his former opinion that a corporation is not liable for a tort committed in an ultra vires undertaking and accepts the American cases sustaining the liability. The need of a broader treatment of Negligence still makes itself felt. On this subject Mr. Salmond's book does not mark an advance over Sir Frederick Pollock's.

E. R. T.

HARVARD LAW REVIEW.

VOL. XXVI.

FEBRUARY, 1913.

NO. 4.

THE JURISDICTION OF COURTS OVER FOREIGNERS.

II. PERSONAL JURISDICTION AT COMMON LAW.

IT has been shown in a former number of the Review¹ that the European notions of the jurisdiction of courts over persons are based on personal power over the party defendant through title to his personal obedience, rather than upon the power of the sovereign over the territory in which the person to be judged happens to be found. It was natural for Italy with its small city states and for Germany with its feudal principalities, often small or even of disconnected portions of territory, to lose sight of territorial power as the ultimate basis of jurisdiction, and to be more impressed with the reciprocal rights of the feudal sovereign and his subjects. Even France, though in time it became a politically compact country, with its natural ambition not in the acquisition of outlying fiefs but in the extension of its boundaries over adjoining territory, had nevertheless a law which continued to be feudal in nature. In France duchies and even small feudal fiefs each had their own law; and in origin these laws were grouped into two entirely distinct systems, that of northern France, which was Germanic, and that of southern France, which was Latin. If these nations therefore laid little stress on mere territorial sovereignty and relied

¹ 26 HARV. L. REV. 193.

chiefly on feudal allegiance as the basis of jurisdiction, it is what we might naturally expect. In England, on the other hand, the law of the king's courts, common to the whole territory of England, became the sole law of the land. The centralizing policy of the Plantagenets was completely effective in arousing the feeling of territorial nationality, and in bringing about the recognition of the king as a territorial rather than a feudal sovereign. It was natural, therefore, that territorial principles should lie at the basis of the jurisdiction of the king's courts. This natural feeling was emphasized by the historical development of the king's courts. Apart from real actions (including debt, which was real in origin) the king's jurisdiction was originally confined to trespass, which he brought within the jurisdiction of his own judges by alleging it to be an act in breach of his peace. Personal actions in the king's courts were therefore in their origin violations of public order; and even the most extreme advocates of the theory of personal jurisdiction admit that questions of public order are reserved solely for the jurisdiction of the territorial sovereign. This original jurisdiction in personal actions was extended by the Statute of Westminster II to cover all actions *in consimili casu*, and the whole modern law of personal actions is derived from this statute. With these political and historical reasons for its adoption we shall not be surprised to find the principle of territorial jurisdiction accepted in all states where the common law prevails.

Outside of its jurisdiction, the court's act is a mere nullity. The only difference between the judgment of a court and a similar order issued by an ordinary individual or association lies in the power of judicial action conferred on the court by the sovereign; for judicial power is one of the attributes of sovereignty, and can be conferred by a sovereign alone. But the sovereign can confer this power only so far as his jurisdiction extends. When a court attempts to act beyond its jurisdiction, its order no longer possesses this attribute; and it has no more legal effect, therefore, than the order of a private individual, that is, none at all.²

² "It is laid down by jurists as an elementary principle that the laws of one state have no operation outside of its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. 'Any exertion of authority of this sort beyond this limit,' says Story, 'is a mere nullity, and incapable of binding

The general rule of the common law, then, is that where a person is actually present within the territory of a certain sovereign he may upon proper service of process be subjected to the jurisdiction of the courts of that sovereign. And this is true although he is a non-resident and is merely temporarily present,³ as for instance where he is traveling through the territory.⁴ To this general rule of jurisdiction an exception appears to have been established. The courts have said that where the defendant has been decoyed into the state by fraud or brought by force, the state has no jurisdiction over him;⁵ so one who is induced to come into the state on pretense of business, and is there served with process, is not bound by the judgment of the court, — unless indeed he has had a reasonable time to leave the state after the conclusion of the business, for if he lingers thereafter he is subject to service.⁶ But though it is ordinarily said that in this case the courts of the state into which a party is inveigled by fraud have no jurisdiction over him, the truth is that there is no defect of jurisdiction, but the fraud of the judgment plaintiff is the basis of an equitable plea in bar of the judgment;⁷ and this is proved by the fact that if the fraud is that of a third party, and does not personally charge the judgment plaintiff, the judgment is perfectly good in spite of the fact that the judgment defendant was fraudulently inveigled into

such persons or property in any other tribunals.' Story, Conf. Laws, sect. 539." Field, J., in *Pennoy v. Neff*, 95 U. S. 714 (1877).

Cf. the language of Griffith, C. J., in *Permanent Building & Investment Association v. Hudson*, 7 Queens. L. J. 23 (1896), 1 Beale, Cases on the Conflict of Laws, 364: "Writs in New South Wales run as far as the border of New South Wales, and no further. Beyond that they are mere pieces of paper — mere notices."

³ *Mason v. Connors*, 129 Fed. 831 (1904); *Lee v. Baird*, 139 Ala. 526, 36 So. 720 (1903); *Darrah v. Watson*, 36 Ia. 116 (1872); *Badger v. Towle*, 48 Me. 20 (1860); *Alley v. Caspari*, 80 Me. 234, 14 Atl. 12 (1888); *Thompson v. Cowell*, 148 Mass. 552, 20 N. E. 170 (1889); *McDonald v. MacArthur*, 154 N. C. 122, 69 S. E. 832 (1910); *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S. W. 1049 (1904).

⁴ *Peabody v. Hamilton*, 106 Mass. 217 (1870).

⁵ *Fraud*: *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304 (1864); *Cavanagh v. Manhattan Trust Co.*, 133 Fed. 818 (1905); *Duringer v. Moschino*, 93 Ind. 495 (1883) (*semble*); *Dunlap v. Cody*, 31 Ia. 260 (1871); *Toof v. Foley*, 87 Ia. 8, 54 N. W. 59 (1893); *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539 (1902); *Copas v. Provision Co.*, 73 Mich. 541, 41 N. W. 690 (1889); *Williams v. Reed*, 29 N. J. L. 385.

Force: *Ziporkes v. Chmelniker*, 15 N. Y. St. Rep. 215 (1888) (*semble*).

⁶ *Jaster v. Currie*, 198 U. S. 144, 148 (1905); *Pilcher v. Graham*, 18 Ohio C. C. 5 (1899).

⁷ *Jaster v. Currie*, 198 U. S. 144 (1905).

the state.⁸ It would seem, then, that in the case of fraud there is no real exception to the general principle that a foreigner personally found within the territory of a sovereign is subject to the jurisdiction of his courts.⁹

On the other hand, in cases where no special ground of jurisdiction exists, it is universally held that a foreigner cannot be subjected to the jurisdiction of a court if he is not actually found within the territory.¹⁰ The leading case on this point is of enough interest to bear statement. It was an action in *assumpsit* on a foreign judgment of the island court of Tobago. The record of the judgment showed that upon the filing of the declaration the court ordered a summons to the defendant to appear, which was served by nailing up a copy of the declaration at the court-house door. The defendant had never been on the island nor did he appear by attorney. It was shown that this mode of summoning absentees was warranted by a law of the island and was actually practised there. The English court, however, refused to recognize the validity

⁸ *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304 (1864), and cases cited; *Ex parte Taylor*, 29 R. I. 129, 69 Atl. 553 (1908).

⁹ The case of a foreign sovereign or his ambassador is of course an exception to the general principle; this exception will not be considered here. For cases bearing on this exception, see Scott's Cases on International Law, 182-186, 192-208.

¹⁰ *D'Arcy v. Ketchum*, 11 How. (U. S.) 165, 13 L. ed., 648 (1850); *Bischoff v. Wethered*, 9 Wall. (U. S.) 812, 19 L. ed., 829 (1869); *Dull v. Blackman*, 169 U. S. 243 (1898); *Osborn v. Lloyd*, 1 Root (Conn.) 301 (1791); *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562 (1846); *Reynolds, etc. Mortgage Co. v. Martin*, 116 Ga. 495, 42 S. E. 796 (1902); *Western Union Tel. Co. v. Pacific & Atlantic Tel. Co.*, 49 Ill. 90 (1868); *Beard v. Beard*, 21 Ind. 321 (1863); *State v. Harvester Co.*, 81 Kan. 610, 106 Pac. 1053 (1910); *McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653 (1910); *Rand v. Hanson*, 154 Mass. 87, 28 N. E. 6 (1891); *Hildreth v. Thibodeau*, 186 Mass. 83, 71 N. E. 111 (1904); *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332 (1878); *Booth v. Connecticut Mutual Life Ins. Co.*, 43 Mich. 299 (1880); *Cocke v. Brewer*, 68 Miss. 775, 9 So. 823 (1891); *State v. Blair*, 238 Mo. 132, 142 S. W. 326 (1911); *Whittier v. Wendell*, 7 N. H. 257 (1834); *Schwinger v. Hickok*, 53 N. Y. 280 (1873); *Bullowa v. Provident Life & Trust Co.*, 125 N. Y. App. Div. 545 (1908); *Davidson v. Sharpe*, 6 Ired. L. (28 N. C.) 14 (1845); *Scott v. Noble*, 72 Pa. 115 (1872); *Price v. Schaeffer*, 161 Pa. 530, 29 Atl. 279 (1894); *Martin v. Martin*, 214 Pa. 389, 63 Atl. 1026 (1906); *Frothingham v. Barnes*, 9 R. I. 474 (1870); *Miller v. Miller*, 1 Bail. L. 242 (1829); *Tillinghast v. Boston, etc. Co.*, 39 S. C. 484, 18 S. E. 120 (1893); *Skinner v. McDaniel*, 4 Vt. 418 (1832); *Miller v. Sharp*, 3 Rand. 41 (1824); *Hopkirk v. Bridges*, 4 Hen. & M. 413 (1808); *Don v. Lippmann*, 5 Cl. & F. 1, 21 (1837); *Schibsy v. Westenholz*, L. R. 6 Q. B. 155 (1870). See, however, *Butterworth v. Kinsey*, 14 Tex. 495 (1855), where suit was allowed against a non-resident not served with process.

of the judgment; and Lord Ellenborough said: "Can the Island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"¹¹ Since the jurisdiction of the court does not extend into the foreign country, and its writ is waste paper there, service of process, or what is service in form, on the foreigner in his own country is ineffective, and does not help the case.¹²

Examples of this principle may be of interest. A court which has jurisdiction to grant a divorce cannot join with its decree a personal judgment for alimony against a non-resident not served with process.¹³ Where a German court issued a decree of bankruptcy against an absent defendant, it could not give a valid judgment for the unpaid balance of the debts.¹⁴ When an action is brought to subject property within the state to the payment of a debt due from a non-resident, a personal judgment cannot be given for a balance unpaid;¹⁵ and *a fortiori* if the suit as originally brought asked for and obtained a personal judgment against a non-resident, this judgment is of course void, and property within the state cannot be taken and applied to the payment of it.¹⁶ A bill for an injunction or other personal suit in equity also requires personal jurisdiction, and cannot be maintained against a non-resident not served with process.¹⁷ Since the defect of jurisdiction, as has been seen, is such that a decree rendered in the case is *coram*

¹¹ *Buchanan v. Rucker*, 9 East 192 (1808).

¹² *Ewer v. Coffin*, 1 Cush. (Mass.) 23, 48 Am. Dec. 587 (1848); *Schibsby v. Westenholz*, L. R. 6 Q. B. 155 (1870); *Permanent Building & Investment Association v. Hudson*, 7 Queens. L. J. 23 (1896). In the latter case the court says: "The document served on him was only a piece of paper to which, in my opinion, he was in no way bound to pay attention."

An exception must, however, be noted to this general statement where two states are under the political jurisdiction of a single sovereign; he may by legislation provide for a binding service of process in any state under his dominion. Thus by statute process from an English court may be legally served in the Isle of Man. *Jackson v. Spittall*, L. R. 5 C. P. 542 (1870); *Vaughan v. Weldon*, L. R. 10 C. P. 47 (1874).

¹³ *Beard v. Beard*, 21 Ind. 321 (1864); *Middleworth v. McDowell*, 49 Ind. 386 (1875).

¹⁴ *Kuehling v. Leberman*, 2 W. N. C. 616 (1875).

¹⁵ *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300 (1883); *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179 (1880); *McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666 (1884); *Arndt v. Arndt*, 15 Oh. 33 (1846); *Price v. Hickok*, 39 Vt. 292 (1866).

¹⁶ *Pennoyer v. Neff*, 95 U. S. 714; *Bartlett v. Holmes*, 12 Hun (N. Y.) 398 (1877).

¹⁷ *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657 (1910); *McKinne v. Augusta*, 5 Rich. Eq. (S. C.) 55.

non judice, as if it had been rendered by a mere private person, the court cannot, by a finding of fact, make for itself a jurisdiction which does not really exist: its finding of fact has no judicial force.¹⁸ In spite of the facts found by a court, therefore, the real fact as to absence of the defendant from the state may be shown in another court to invalidate the judgment.¹⁹

Before proceeding to discuss special grounds of jurisdiction over persons present, it will be well to consider how far this jurisdiction, if it exists, will be exercised by the common law. Three possible limitations have been urged.

(1) Opening the courts to foreigners. It has been seen that in France the courts are not open to foreigners. In cases governed by common law, however, the courts are in general freely open to all persons, as well in actions between foreigners as where one party is a citizen.²⁰ Even the special provisions by which poor persons are given favors, as, for instance, where they are allowed to sue *in forma pauperis*, are extended as freely to foreigners as to citizens of the state.²¹ It is only in New York that any limitation has been seriously suggested, and there the limitation applies generally only in the case of foreign corporations.²²

¹⁸ Knowles v. Logansport Gaslight & Coke Co., 19 Wall. (U. S.) 58, 22 L. ed. 70 (1874).

¹⁹ Palmer v. De Witt, 47 N. Y. 532 (1871); Western Union Tel. Co. v. Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638; s. c. 30 S. W. 494 (1893).

²⁰ Roberts v. Dunsmuir, 75 Cal. 203, 16 Pac. 782 (1888); Frank Simpson Fruit Co. v. Atchison, T. & S. F. Ry., 245 Ill. 596, 92 N. E. 524 [1910]; Levi v. Kaufman, 12 Ind. App. 347, 39 N. E. 1045 [1895]; Barrell v. Benjamin, 15 Mass. 354 [1819] (*semble*); Roberts v. Knights, 7 Allen (Mass.) 449 (1863); Johnston v. Trade Ins. Co., 132 Mass. 432 (1882); Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623 (1890); Miller v. Black, 2 Jones L. (47 N. C.) 341 (1855); Walters v. Breeder, 3 Jones L. (48 N. C.) 64 (1855); McDonald v. MacArthur Bros. Co., 154 N. C. 122, 69 S. E. 832 (1910); Western Union Tel. Co. v. Clark, 14 Tex. Civ. App. 563, 38 S. W. 225 (1896); American Well Works v. De Aguayo, 53 S. W. 350 (Tex. Civ. App., 1899); Pullman Palace Car Co. v. Arents, 28 Tex. Civ. App. 71, 66 S. W. 329 (1902).

In a few states statutes have limited this principle. Thus by the faulty wording of an early statute in Kentucky it was held that while a non-resident might sue another non-resident or a citizen, he could not sue a resident alien. Lexington Mfg. Co. v. Dorr, 2 Litt. (Ky.) 256 (1822); Banks v. Fowler, 3 Litt. (Ky.) 332 (1823); Ormsby v. Lynch, Litt. Sel. Cas. (Ky.) 303 (1821).

And in Michigan one foreign corporation may not ordinarily sue another on a foreign contract. National Coal Co. v. Cincinnati G. C. C. & M. Co., 131 N. W. 580 (Mich., 1911).

²¹ Lisenbee v. Holt, 1 Sneed (Tenn.) 42 (1853).

²² No effort will be made here to examine and classify the New York cases. The

(2) Proceeding on a foreign cause of action. There was great difficulty in England, owing to the form of proceeding in the middle ages, in the way of opening the courts to a foreign cause of action. The jury on which the courts must rely for information of facts was originally, as is well known, summoned from the vicinage, in order to give information of facts known to them;²³ and since the writ would not run to summon a jury or witness from abroad it was theoretically impossible to prove foreign facts. As early as the year 1282 an offer was made to bring a foreign dispute before the English courts.²⁴

"The Florentine and many other Italian merchants obtained and enjoyed very many franchises and privileges in this kingdom. And at this time there were two factions or parties in Florence, to wit, Guelphs and Gibelines. Of these the Guelphs eventually were victorious and expelled the Gibelines from the city; and they destroyed the house of a certain Hugh le Pape, a merchant domiciled in this kingdom. This Hugh prayed our Lord the King that the Italian merchant should make compensation to him for this. The King deputed for this purpose two judges, to take inquisition as above. The said foreign merchants having been brought together they took inquisition as above. And though before one of those justices it was adjudged that said merchants should satisfy said Hugh for the damages suffered by the destruction of his house, it was brought before our Lord the King by writ of certiorari, and error was found in these words: because it is not the custom of England that any one should answer in the Kingdom of England for any trespass committed abroad in time of war or otherwise. It is adjudged that the whole proceeding and judgment is annulled, etc."

For a similar reason there was at first thought to be an insuperable objection to a foreign corporation bringing suit in England, namely, that there was no way of proving the proper record of its incorporation. These difficulties disappeared as soon as evidence was pre-

most important decisions are the following: *Gardner v. Thomas*, 14 Johns. (N. Y.) 134 (1817); *Otis v. Wakeman*, 1 Hill (N. Y.) 604 (1841); *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625 (1889); *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949 (1890); *Latourette v. Clarke*, 45 Barb. (N. Y.) 327, 30 How. Pr. 242 (1865); *Reed v. Chilson*, 16 N. Y. Supp. 744 (1891); *Hatfield v. Sisson*, 28 Misc. 255, 59 N. Y. Supp. 73 (1899); *Anglo-American Provision Co. v. Davis Provision Co.*, 50 N. Y. App. Div. 273, 63 N. Y. Supp. 987 (1900); *Collard v. Beach*, 93 N. Y. App. Div. 339, 87 N. Y. Supp. 884 (1904).

²³ Thayer, Preliminary Treatise on Evidence, 90 *et seq.*

²⁴ Abbrev. Placit. 201 (M. 9 & 10 Ed. I.).

sented to the jury by the testimony of witnesses, or by copies of documents. A foreign corporation was eventually allowed to sue upon proving its incorporation by means of a document.²⁵ But another difficulty lay in the way of the exercise by the English courts of jurisdiction to redress foreign wrongs. In its origin the jurisdiction of the king's courts in personal actions, as has already been noticed, was based upon the commission of a breach of the king's peace; and as this was a jurisdictional fact, the tort, including the breach of the peace, must be laid as occurring at some place within the kingdom. When the new action on the case came into existence the same form of allegation naturally continued.

The difficulty caused by the form of allegation in the pleadings was finally surmounted by a fiction: namely, by laying a fictitious venue at some place within the kingdom; and this fictitious allegation of venue was not allowed to be disputed. In the first reported case of action for a foreign tort the wrong was committed in the island of Minorca; and the venue was laid "at Minorca, to wit at London aforesaid in the Parish of St. Mary le Bow in the Ward of Cheap."²⁶ From this time it became possible to sue in England for a foreign tort or breach of contract. The right to sue upon a foreign cause of action was recognized earlier in this country than in England. In 1648 the General Court of the Colony of Massachusetts Bay allowed suit for a battery committed in England, "Because a personall action follows the person & from the person onely the cause of the action ariseth."²⁷ As a result of this principle it is generally true to-day that personal action may be brought in any place.²⁸

²⁵ *Dutch West India Co. v. Van Moses*, 1 Stra. 612 (1724); in error, *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532 (1728). In the latter report the reporter says that "upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there."

²⁶ *Mostyn v. Fabrigas*, Cowp. 161 (1774).

²⁷ 2 Mass. Colon. Rec. 255.

²⁸ *Foreign Contract*: *Levi v. Kaufman*, 12 Ind. App. 347, 39 N. E. 1045 (1895); *Johnston v. Trade Ins. Co.*, 132 Mass. 432 (1882); *Smith v. Crocker*, 14 N. Y. App. Div. 245 (1897); *American Well Works v. De Aguayo*, 53 S. W. 350 (Tex. Civ. App. 1899).

Foreign Tort: *Mitchell v. Harmony*, 13 How. (U. S.) 115, 14 L. ed. 75 (1851); *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782 (1888); *Fruit Co. v. Railroad Co.*, 245 Ill. 596, 92 N. E. 524 (1910); *Bershears v. Distilling Co.*, 80 Kan. 194, 101 Pac.

These ordinary personal actions in which suit can be brought anywhere are the so-called transitory actions. A class of personal actions however, called local, are not allowed outside the place where the cause of action arose. The principal action of this class is an action for trespass on land. The doctrine is firmly established in England that no suit can be brought outside the state where the wrong occurred for any tort which might result in the setting up of title to land; because, as the court says, the court could not make a declaration of title to foreign land, and should therefore not award damages for the trespass.²⁹ This decision is followed in most of the states in this country,³⁰ although vigorous dissent from it has been expressed in Minnesota.³¹

It seems to the writer that reasons both of theory and of convenience are in accordance with the Minnesota decision. The action is one for damages. The judgment in it can by no possibility, as the English court appears to fear, result in affecting the title of the land, even as between the parties; since the injury alleged is only to the actual possession, and judgment for the plaintiffs, or even satisfaction of that judgment, could by no possibility, even if the land were within the jurisdiction, affect the title to it, even between the parties. If indeed title in the defendant

1011 (1909); *Watts v. Thomas*, 2 Bibb (Ky.) 458 (1811); *Mason v. Warner*, 31 Mo. 508 (1862); *Henry v. Sargent*, 13 N. H. 321 (1843); *Ackerson v. Erie R. Co.*, 31 N. J. L. 309 (1865); *Lister v. Wright*, 2 Hill (N. Y.) 320 (1842); *Hatfield v. Sisson*, 28 Misc. 255, 59 N. Y. Supp. 73 (1899); *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. 638, s. c. 30 S. W. 494 (1893); *Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225 (1896); *Pacific Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441 (1907); *Banco Minero v. Ross* (Tex. Civ. App.), 138 S. W. 224 (1911).

²⁹ *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. It is on this ground that the otherwise unaccountable decision of *Matthaei v. Galitzin*, L. R. 18 Eq. 340 (1874), must be rested. Dicey, *Conflict of Laws*, § 216.

³⁰ *Eachus v. Trustees*, 17 Ill. 534 (1856); *Indiana, B. & W. Ry. v. Foster*, 107 Ind. 430, 8 N. E. 264 (1886); *De Breuil v. Pennsylvania Co.*, 130 Ind. 137, 29 N. E. 909 (1891); *Allin v. Connecticut R. L. Co.*, 150 Mass. 560, 23 N. E. 581 (1890); *Doherty v. Cement Co.*, 72 N. J. L. 315, 65 Atl. 508 (1905); *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703 (1888); *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650 (1893); *Niles v. Howe*, 57 Vt. 388 (1885); *Bettys v. Milwaukee & S. P. Ry.*, 37 Wis. 323 (1875).

In *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550 (1885), it was held that suit may be brought in Kansas for sand severed in Missouri and brought into Kansas; for trespass *quare clausum* may be waived and the action brought as a transitory action of trover.

³¹ *Little v. Chicago, S. P. M. & O. Ry.*, 65 Minn. 48, 67 N. W. 846 (1896). Followed in the United States court for the District of Minnesota: *Peyton v. Desmond*, 129 Fed. 1 (1904).

were set up by way of confession and avoidance and were denied by the plaintiff, and judgment proceeded upon that issue, the title as between the parties might be affected, but merely by way of *res judicata*; and if the land were foreign land the judgment would be ineffective even to this extent. The determination of the foreign title for the purposes of this suit would be merely the incidental determination of a fact such as the courts are every day compelled to make. On the other hand, if no redress is given it would always be possible for an ill-disposed person trespassing upon land, either by directing a destructive force upon the land from outside the jurisdiction, or by personally trespassing and leaving the jurisdiction, to do his harm with absolute impunity. This exception, therefore, grafted as it is on the sound general principle, seems unfortunate.

(3) The jurisdiction of a court of equity is, at common law, generally exercised only *in personam*. So far as jurisdiction in the international sense is concerned, the court may act upon any person whom it finds within the territory of its sovereign; but although in such cases there is international jurisdiction it does not necessarily follow that the court will exercise its jurisdiction. While equity has large powers to direct the conduct of parties it would seem clear that it should refrain from ordering actions to be done in a foreign country. If a court of equity, for instance, should order a man to do an act in another state, and when he went about to do it the act proved to be forbidden by the sovereign of that state, a condition of affairs would arise which the law could not contemplate with satisfaction. The defendant must either obey the court, act, and commit an offense against the territorial sovereign, or in obeying the law of the territorial sovereign must violate the decree. The unfortunate predicament of such a man is illustrated by the case of *Langford v. Langford*.³² In that case the defendant had charged his Irish estates in favor of the plaintiff; but it was claimed that there were prior incumbrances. The Master of the Rolls got jurisdiction over the person of the defendant and ordered a receiver for the Irish estates; and the tenants were served with a notice to pay the rents to this receiver. The defendant, after giving his Irish solicitor notice of the order of the court,

³² *Langford v. Langford*, 5 L. J. N. S. Ch. 60 (1835). See also *In re Maudslay*, [1900] 1 Ch. 602.

directed him to oppose the receiver's receiving the rents as far as the law would permit. The English receiver was unable to obtain payment of the rents; and it was assumed that under the Irish law the rents should have been paid to the defendant's agent, and not to the receiver. The court held that the defendant was in contempt; and thus stamped it as contempt of the English courts to direct his solicitor in Ireland to obey the law of Ireland. This is surely an unfortunate position for the English court of equity to take. It may be urged that the defendant should either have given no direction to his agent, or at least have directed him to permit the receiver to receive the rents so far as the law would permit. But this removes the difficulty only a step. To suffer the receiver to take the rents without interference would have enabled the English court to dispose of Irish property without securing a conveyance from the owner. The court might of course have required the defendant to execute a lease to the receiver; but the latter must then contend with the prior incumbrancers.

A better view is usually taken by the courts. According to the generally accepted doctrine a court of equity will order no act, even a ministerial act, to be done outside the territory over which the court has power;³³ nor will it do any act to interfere with the title to foreign land.³⁴ Of course a defendant within the control of the court may be enjoined from doing any act anywhere in the world, since he may obey the court without leaving the jurisdiction or in any way subjecting himself to the laws of other countries.³⁵

³³ So a court of equity may not order the abatement of a foreign nuisance: *People v. Central R. Co.*, 42 N. Y. 283 (1870). Nor grant specific performance of a contract to dig a ditch in a foreign state. *Port Royal R. Co. v. Hammond*, 58 Ga. 523 (1877). Nor declare a deed of foreign land void. *Carpenter v. Strange*, 141 U. S. 87 (1891); *State v. Grimm*, 148 S. W. 868 (Mo., 1912); *Davis v. Headley*, 22 N. J. Eq. 115 (1871). But see *Commonwealth v. Levy*, 23 Gratt. (Va.) 21 (1873).

So a court cannot by mandamus compel the operation of a foreign railroad. *People et rel. Van Dyke v. Colorado Central R. Co.*, 42 Fed. 638 (1890).

³⁴ *Watkins v. Holman*, 16 Pet. (U. S.) 25 (1842); *Lynde v. Columbus, C. & I. C. Ry.*, 57 Fed. 993 (1893); *White v. White*, 7 Gill & J. (Md.) 208 (1835); *Sutton v. Archer*, 93 Miss. 603, 46 So. 705 (1908); *Johnson v. Kimbro*, 3 Head (Tenn.) 557 (1859); *Gibson v. Burgess*, 82 Va. 650 (1886). But see *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067 (1896); *Wood v. Warner*, 15 N. J. Eq. 81 (1862).

³⁵ *Philadelphia Co. v. Stimson*, 223 U. S. 605 (1912); *Western Union Tel. Co. v. Pittsburg, C. C. & S. L. Ry.*, 137 Fed. 435 (1905); *Alexander v. Tolleston Club*, 110 Ill. 65 (1884); *Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309 (1885), 3 N. E. 826 (1885); *Frank v. Peyton*, 82 Ky. 150 (1884); *French v. Maguire*, 55 How. Pr. (N. Y.) 471

But he cannot be called upon to do a positive act abroad. It is for this reason that while a court of equity will ordinarily decree the specific performance of a contract to convey foreign land, since the decree is simply that the defendant execute a deed of the land, which he may do within the territory of the court,³⁶ and may for the same reason compel him to account for the proceeds of foreign land,³⁷ a bill for a conveyance will not be entertained where the only method of conveying the foreign land is by the doing of some act within the territory where the land lies; as, for instance, if the title can be conveyed only by entry upon the local register.³⁸

While these principles have been generally accepted by common-law courts a few late cases decided under somewhat aggravating circumstances appear to have departed from them, or at least to tend to a widening of the jurisdiction of equity.

The first of these cases were the Salton Sea Cases.³⁹ The facts, as stated in a previous number of this Review,⁴⁰ were as follows:

"The defendant constructed a canal conveying the waters of the Colorado River by means of an intake situated in Mexico. An accumulation of water resulted within the territory of Arizona which damaged the plaintiff's property situated therein."

An injunction was issued against diverting water from the river, except on certain conditions; among which were provisions regulat-

(1878); *Gibson v. American Loan & Trust Co.*, 58 Hun (N. Y.) 443, 12 N. Y. Supp. 444 (1890). See *Atlantic & Pacific Tel. Co. v. Baltimore & Ohio R. Co.*, 46 N. Y. Super. Ct. 377 (1880).

³⁶ *Massie v. Watts*, 6 Cranch (U. S.) 148 (1810); *Guild v. Guild*, 16 Ala. 121 (1849); *Lamkin v. Lovell*, 58 So. 258 (Ala., 1912); *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117 (1890); *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826 (1888); *Reed v. Reed*, 75 Me. 264 (1883); *Brown v. Desmond*, 100 Mass. 267 (1868); *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551 (1892); *Gardner v. Ogden*, 22 N. Y. 327 (1860); *Joy v. Midland State Bank*, 26 S. D. 244, 128 N. W. 147 (1910); *Guerrant v. Fowler*, 1 Hen. & M. 5 (1806); *Poindexter v. Burwell*, 82 Va. 507 (1886); *Penn v. Lord Baltimore*, 1 Ves. Sr. 444 (1750).

So a bill will lie against a mortgagee in trust to compel him to exercise his power of sale in foreign land. *Mead v. N. Y. H. & N. R. Co.*, 45 Conn. 199 (1877); *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103 (1894); *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 7 N. E. 822 (1886).

³⁷ *Edwards v. Ballard*, 14 La. Ann. 362 (1859).

³⁸ *Waterhouse v. Stansfield*, 10 Hare 254 (1852).

³⁹ 172 Fed. 792 (1909).

⁴⁰ 23 HARV. L. REV. 400; and see a criticism of the cases, *ibid.* 390. See this note for an excellent discussion of the questions here under discussion.

ing the flow. In order to obey the injunction it was clear that the defendant must change his gates in Mexico; but this was held no objection. The court said:

"Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court may act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen, and would it not happen oftener, if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

The case seems rightly decided on the facts; and it is no real extension of principle. The relief asked is an injunction; and, as has been seen, an injunction may always be granted against doing an act abroad. Here the act abroad injures land within the jurisdiction of the court, and the act is therefore tortious by our law. If in such a case the defendant has by his wrongful conduct put himself into a position where he cannot refrain from further tort, except by doing some act abroad, it is his own affair; the court merely enjoins the continuance of the tort.

The other case is similar. The defendants were, by works outside Nevada, wrongfully diverting water from a stream in Nevada. The plaintiff, who was injured by the diversion, brought suit for an injunction against the diversion. The defendant thereupon brought suit in California to quiet his title to the water; and the plaintiff then brought the present suit to enjoin the California suit. The Supreme Court upheld an injunction.⁴¹ The relief prayed for was merely an injunction. Obedience to injunction in the original suit would, to be sure, have required alteration in works in California; but the same reasoning applies as in the Salton Sea Cases. The defendant has put himself in such a position that he must continue to commit a tort in Nevada or else do the act in the other state. These decisions appear to involve no clear violation of principle. But it must be confessed that the federal courts show a tendency to transcend state lines in the exercise of equity jurisdiction.

No excuse, however, can be found for an unwarranted departure from principle in a recent New Jersey case. The New Jersey

⁴¹ Rickey L. & C. Co. v. Miller, 218 U. S. 258 (1910.)

court, being the court of the wife's domicile, on the ground of having jurisdiction for divorce, and as a step in a bill for divorce brought by the wife, enjoined the non-resident husband against procuring a divorce in North Dakota, and served the injunction by publication. On his disobedience, it ordered him to try to induce the North Dakota court to set aside the decree of divorce it had granted him.⁴²

Returning now to the general exercise of personal jurisdiction, let us examine cases where special jurisdiction may be claimed over a person not actually within the territory.

(A) *Domicile*. It seems to be pretty clear that every person domiciled within a territory is subject, so long as this domicile continues, to the jurisdiction of his sovereign, and therefore is personally subject to the courts of the sovereign. This is recognized in the common practice of permitting service of process at the last and usual place of abode of a defendant. In the leading case a person domiciled in Scotland was absent in Australia, and according to the Scotch law was served with process by proclamation at the Market Cross of Edinburgh and at the pier and shore of Leith. It was held that by this process the Scotch court obtained complete personal jurisdiction over him.⁴³ This principle has been generally, though not universally, accepted in America.⁴⁴ If the sovereign of domicile has this power, it would seem *a fortiori* that the sovereign of allegiance would equally have such power; and it is believed that this is the case.

(B) *Cause of action arising within the territory*. There is a considerable body of authority to the effect that a defendant is personally subject to the jurisdiction of the courts of a state within which he committed a tort, or made or broke a contract. When carefully examined it would appear that all these suggestions are

⁴² *Kempson v. Kempson*, 63 N. J. Eq. 783 (1902). The lack of personal jurisdiction over the husband in the original proceeding will be noted. The opposite decision was reached in a California case: *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345 (1896), where there was no difficulty of jurisdiction, because the absent spouse was still a citizen. See a learned note to the decision, 53 Am. St. Rep. 165.

⁴³ *Douglas v. Forrest*, 4 Bing. 686 (1828). *Acc. Cowan v. Braidwood*, 1 M. & G. 882 (1840).

⁴⁴ *Glover v. Glover*, 18 Ala. 367 (1850); *Henderson v. Staniford*, 105 Mass. 504 (1870); *Hunt v. Hunt*, 72 N. Y. 217 (1878); *Frothingham v. Barnes*, 9 R. I. 474 (1870) (*semble*). *Contra*, *Smith v. Grady*, 68 Wis. 215 (1887).

merely *dicta*. The question finally arose for actual decision in England in the interesting case of *Sirdar Gurdial Singh v. Rajah of Faridkote*.⁴⁵ In that case the defendant had acted as treasurer of one of the independent Indian sovereigns. While acting as treasurer, it was claimed, he embezzled funds of the state. Having left the state, of which he was not a citizen, he had been sued *in absentem* in the native court, and judgment had been obtained against him. Suit was brought on this judgment in a colonial court, and on appeal the Judicial Committee of the Privy Council held that:

"No territorial legislation can give jurisdiction which any foreign court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates."

(C) *Property within the jurisdiction*. It has been intimated, particularly in the earlier cases, that the mere presence of property of a defendant within the jurisdiction of the court gives the court power to issue a personal judgment against him;⁴⁶ the reason alleged being, that by placing his property within the care of the sovereign the defendant thereby has subjected himself to the courts of the sovereign. In most cases where this intimation is made the court probably meant no more than that the property was thereby subjected to the decree of the courts: a doctrine which will be examined in a later article. If more than that was intended by the intimations, they have been thoroughly discredited by later authority; and it may now be said without question that no one is personally subject to the jurisdiction of a court merely because he owns property within the territory of the court.⁴⁷

(D) *Consent*. Consent is the principal ground of jurisdiction over an absent party, and it is in general a sufficient ground. Such consent must of course be actual. No inference or presumption contrary to actual fact, such as a presumption of law, or any fictitious rule of a particular law finding consent, if consent does not actually exist, can give a court power over a person not other-

⁴⁵ [1894] A. C. 670.

⁴⁶ *Penn v. Evans*, 28 La. Ann. 576 (1876); *Ewer v. Coffin*, 1 Cush. (Mass.) 23, 48 Am. Dec. 587 (1848) (*semble*); *Johnson v. Herbert*, 45 Tex. 304 (1876).

⁴⁷ *Pennoyer v. Neff*, 95 U. S. 714 (1877); *McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666 (1850); and cases cited *ante*, note 15.

wise within its jurisdiction. In every case, therefore, it will be necessary to find actual consent to found jurisdiction.

The commonest instance of such consent is the voluntary appearance of the party. Thus if a defendant gets actual knowledge of the pendency of the suit against him and employs counsel to enter his appearance, he will be bound by the result of the suit;⁴⁸ *a fortiori*, if he enters a general demurrer, answer, or motion to dismiss on the merits.⁴⁹

This is true even though his appearance was entered through a mistake of law as to his rights, or under the decree of a court which in fact had no power to make such a decree.⁵⁰ The appearance must of course be an appearance to litigate the subject matter. A mere special appearance by counsel to deny the jurisdiction is not a consent to the jurisdiction.⁵¹

Will "acceptance of service" of the writ, made outside the jurisdiction of the court, constitute consent to the jurisdiction? In one meagerly reported case it was held that it would.⁵² In another case the court held otherwise, on the ground that such acceptance merely constituted acknowledgment of notice, and since the process was void this amounted to nothing.⁵³ It would seem that the case should not be determined by any technicality as to the nature of the process, but by an inquiry as to the actual intention with which the acceptance was made.

As the appearance of a defendant gives the court jurisdiction to enter a decree against him, so also the appearance of a plaintiff gives the court jurisdiction to pass not merely upon his own demand, but upon any cross demand of the defendant which may be con-

⁴⁸ *National Coal Co. v. Cincinnati G. C. C. & M. Co.*, 131 N. W. 580 (Mich., 1911); *McCormick v. Pennsylvania Central R. Co.*, 49 N. Y. 303 (1872); *Shumate v. Harbin*, 35 S. C. 521, 15 S. E. 270 (1892); *Banco Minero v. Ross*, 138 S. W. 224 (1911).

⁴⁹ *State v. District Court*, 40 Mont. 359, 106 Pac. 1098 (1910) (motion for time to answer); *Stone v. Union Pacific R. Co.*, 32 Utah 185, 89 Pac. 715 (1907) (demurrer and answer). In Georgia the filing of a bond to dissolve a garnishment does not amount to consent to the jurisdiction. *Henry v. Lennox-Haldeman Co.*, 116 Ga. 9, 42 S. E. 383 (1902); *Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13, 42 S. E. 385 (1901).

⁵⁰ See *Howell v. Gordon*, 40 Ga. 302 (1869).

⁵¹ *Gray v. Hawes*, 8 Cal. 562 (1857); *German Bank v. American Fire Ins. Co.*, 83 Ia. 491, 50 N. W. 53 (1891); *Wright v. Boynton*, 37 N. H. 9 (1858).

⁵² *People's, etc. Association v. Mayfield*, 42 S. C. 424, 20 S. E. 290 (1894).

⁵³ *Scott v. Noble*, 72 Pa. St. 115, 13 Am. Rep. 663 (1872).

sidered legitimately to form part of the same subject matter.⁵⁴ This principle has been carried to such an extent that a foreign sovereign who cannot under any circumstances be made a party against his will may nevertheless be subjected to any cross suit of the sort described as well as to incidental orders during the progress of the proceedings.⁵⁵

If jurisdiction has once been obtained over a defendant, subsequent removal out of the territory will not deprive the court of the power already obtained.⁵⁶ If the defendant has become subject to the court, he continues so subject in all process arising out of the litigation, such as appeals, writs of error, and all subsequent proceedings in the suit.⁵⁷

Consent to the jurisdiction in the first instance means consent to everything that legitimately arises out of the claim originally made. It is not, however, a consent to submit to the jurisdiction as to matters newly brought into the litigation subsequently to the consent given. For this reason no judgment can be given against an absent party which is not responsive to the declaration, or other statement of claim of which he has had notice.⁵⁸

A curious case arose in Ohio. An Ohio defendant had appeared by counsel in Arkansas before the outbreak of the Civil War; and after the war broke out a judgment was rendered against him. The court held that this judgment was not binding. The court of the seceding state was not the body to whose jurisdiction he had consented; and the continued appearance of counsel did not bind him by a new consent, since counsel's authority to represent him was revoked by the war.⁵⁹

Not only may the defendant consent to the jurisdiction by appearance after litigation has begun: he may also submit to the

⁵⁴ *Arkwright Mills v. Aultman & Taylor Machinery Co.*, 128 Fed. 195 (1904); *Aldrich v. Blatchford*, 175 Mass. 369, 56 N. E. 700 (1900).

⁵⁵ *Prioleau v. United States*, L. R. 2 Eq. 659 (1866).

⁵⁶ *Carter v. Mutual Life Ins. Co.*, 10 Hawaii 559 (1895); *Traders' Mutual Life Ins. Co. v. Humphrey*, 207 Ill. 540, 69 N. E. 875 (1904).

⁵⁷ *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100 (1891). See also *Weaver v. Boggs*, 38 Md. 255 (1873). One who has entered into a recognizance in court, being already subject to the jurisdiction, is subject to the issuance of process upon the forfeited recognizance without further service. *Elsasser v. Haines*, 52 N. J. L. 10, 18 Atl. 1095 (1889).

⁵⁸ *Shields v. Coleman*, 157 U. S. 168 (1894).

⁵⁹ *Pennywit v. Foote*, 27 Oh. St. 600, 22 Am. Rep. 340 (1875).

jurisdiction in advance. Thus it is possible to agree that all matters arising out of a contract may be tried in a particular court.⁶⁰ This is the case where the defendant signs what is called a judgment note; that is, a note in which he expressly consents that an attorney may confess judgment in his name in any court.⁶¹ Such consent, however, thus given in advance, must be exactly followed. So where the maker of a bond authorized "any attorney of any court of record in the State of New York or any other State" to confess judgment against him, it was held that a judgment confessed by the prothonotary of a Pennsylvania court did not bind him, though the law of Pennsylvania authorized that officer to confess judgment upon such instruments. He was not authorized by the exact language of the bond, and his act therefore did not bind the maker.⁶²

The question of consent to the jurisdiction of a court arises with respect to provisions of law, or to clauses in the articles of agreement of an association, to the effect that any member of the association may be sued at the domicile of the association. It is to be remembered that here, as everywhere, no provision of law can extend jurisdiction over the party, but his own consent is necessary; and we must find this consent in fact, if he is to be held. If the provision submitting the members of the association to the jurisdiction of a particular court is contained in the articles of association, so that in asking to be a member of the association he must necessarily have accepted this among the other provisions of the articles, we may fairly say that he has consented to the jurisdiction of the court as the articles clearly provide. If, however, the provision is simply a provision of the general laws of the country in which the association has been created, it is more difficult, if not impossible, to find such actual consent. The party knows that he is agreeing to articles of association, and therefore does in fact assent to them, even though he may choose to remain in ignorance of their particular provisions. This, however, cannot be said of his mental attitude toward the general laws of the foreign state which has

⁶⁰ *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425 (1903).

⁶¹ *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306 (1895); *Teel v. Yost*, 128 N. Y. 387, 28 N. E. 353 (1891).

⁶² *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287 (1890). *Acc.* *First Nat. Bank v. Cunningham*, 48 Fed. 510 (1891).

chartered the association. While in a technical or fictitious sense these laws may be said to be incorporated in the articles of association, this is not true in fact; and unless a member happens to know that membership in the association does, according to the law forming it, involve a submission to the jurisdiction of a particular court, it is hardly possible to find an express consent to such jurisdiction. The English courts seem to be correct, therefore, in distinguishing between an assent to jurisdiction contained in the articles of association and a fictitious assent required by the general law of the incorporating company.⁶³

Joseph Henry Beale.

HARVARD LAW SCHOOL.

⁶³ *Vallee v. Dumergue*, 4 Exch. 290 (1849); *Bank of Australasia v. Harding*, 9 C. B. 661 (1850); *Bank of Australasia v. Nias*, 16 Q. B. 717 (1851); *Copin v. Adamson*, L. R. 9 Ex. 345 (1874).

THE ADMINISTRATION OF JUSTICE IN THE MODERN CITY.

I.

FOR most practical purposes, American legal and judicial history begins after the Revolution. The administration of justice in colonial America was at first executive and legislative.¹ A remnant of the former still exists in the judicial functions of mayors in some jurisdictions. The latter persisted a long time. Legislative divorces were granted in New York after the Revolution² and were known in Connecticut,³ Maryland,⁴ and Rhode Island⁵ in the nineteenth century. Pennsylvania did not do away with them till 1874,⁶ and the legislature of Alabama attempted to grant a divorce as late as 1888.⁷ During the Revolution and even later it was the practice in some states to obtain a new trial by legislative act after final judgment.⁸ The legislature of Rhode Island exercised jurisdiction in insolvency until 1832, and appellate jurisdiction till 1857.⁹ The senate and the superior judges

¹ "In all the Colonies the General Assembly or Legislature at first constituted the sole court of law; later the Governor and his Deputies or Assistants; and in many Colonies it was not until half a century after settlement that separate and independent courts were instituted." Warren, *History of the American Bar*, 1. "All causes of marriage, divorce and alimony, and all appeals from the judges of probate shall be heard and determined by the Governor and Council until the legislature shall by law make other provision." Mass. Const., 1780, Pt. II, ch. 3, art. 5.

² 2 Kent, *Commentaries*, 97.

³ *Starr v. Pease*, 8 Conn. 541 (1831).

⁴ *Crane v. Meginnis*, 1 Gill & J. 474 (1829).

⁵ The legislature of Rhode Island entertained applications for divorce till 1852. Eaton, *Development of the Judicial System in Rhode Island*, 14 Yale L. J. 148, 153.

⁶ *Cronise v. Cronise*, 54 Pa. St. 255 (1867). In 1873, the last year in which this jurisdiction was exercised, eighteen private divorce acts were passed. Loyd, *Early Courts of Pennsylvania*, 102.

⁷ *Jones v. Jones*, 95 Ala. 443 (1891).

⁸ Plumer, *Life of Wm. Plumer*, 170; Warren, *History of the American Bar*, 136. In *Merrill v. Sherburne*, 1 N. H. 199, 216 (1818), four cases of legislative granting of new trials between 1791 and 1817 are referred to.

⁹ Eaton, *Development of the Judicial System in Rhode Island*, 14 Yale L. J. 148, 150-153.

constituted the court of errors and appeals in New York until 1846.¹⁰ Moreover, with a few conspicuous exceptions, the courts, prior to and for some time after the Revolution, were made up largely of untrained magistrates who administered justice according to their common sense and the light of nature, with some guidance from legislation.¹¹ Of the three justices of the Superior Court of New Hampshire after independence, one was a clergyman and another a physician.¹² A judge of the highest court of Rhode Island from 1814 to 1818 was a blacksmith, and the Chief Justice of that state from 1819 to 1826 was a farmer.¹³ When James Kent went upon the bench in New York in 1798 he could say with entire truth

"There were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own and nobody knew what [the law] was."¹⁴

Our judicial organization, then, and the great body of our American common law are the work of the last quarter of the eighteenth century and the first half of the nineteenth century. On the other hand our great cities and the social and legal problems to which they give rise are of the last half of the nineteenth century, and indeed the pressing problems do not become acute until the last quarter of that century. Our largest city now contains in three hundred and twenty-six square miles a larger and infinitely more varied population than the whole thirteen states when the federal judicial organization, which has so generally served as a model, was adopted. But New York City did not attain a population of one million until about 1880; and questions of sanitation and housing were first urged after the Civil War. Such commonwealths as the states west of the Missouri, each of which, with a population not much exceeding a million, occupies an area

¹⁰ N. Y. Const., 1777, Art. 32; N. Y. Const., 1821, Art. 5, § 1.

¹¹ "In all the Colonies the courts were composed of laymen, with the possible exception of the Chief Justice. It was not until the era of the War of the Revolution that it was deemed necessary or even advisable to have judges learned in the law." Warren, *History of the American Bar*, 1.

¹² Corning, *The Highest Courts of Law in New Hampshire*, 2 Green Bag, 469, 470.

¹³ Edwards, *The Supreme Court of Rhode Island*, 2 Green Bag, 525, 532-533.

¹⁴ *Memoirs of Chancellor Kent*, 289. "In none of the Colonies were there any published reports of decided cases prior to the Revolution." Warren, *History of the American Bar*, 2.

about two-thirds as great as the German empire, represent more nearly the conditions for which the American judicial organization was developed and for which the common law of England was made over into a law for America.

Hence, to understand the administration of justice in American cities at the end of the nineteenth century we must first perceive the problems of administration of justice in a homogeneous pioneer or rural community of the first half of the nineteenth century and the difficulties with which lawyers and jurists had to contend in meeting those problems. Next we must perceive the problems of administration of justice in a modern urban community, and the difficulties involved in meeting these problems with the legal and judicial machinery that has come down to us. These things comprehended, it may be possible to suggest the lines along which improvement should be sought and the means of improvement which are available.

Accordingly we may turn first to the problems of administration of justice in the homogeneous pioneer or rural community of the first half of the nineteenth century. These problems were three: (1) to work out a system of principles and rules, adapted to America, on the basis of the common law of England, (2) to decentralize the administration of justice so as to bring justice to every man's door, and (3) by making over the English criminal law and criminal procedure to devise means to restrain the occasional criminal and the criminal of passion in a homogeneous community, of a vigorous pioneer race, restrained already for the most part by deep religious conviction and strict moral training.

Chief of these problems was the one first named, the problem of working out a system of principles and rules adapted to America. In a rude pioneer community the main point is to keep the peace. Tribunals with power to enforce their judgments are the most pressing need.¹⁵ This stage had been gone through with prior to the Revolution. In the next stage, as wealth increases, commerce develops, and society becomes more complex, the social interests in the security of acquisitions and in the security of transactions call imperatively for certainty and uniformity in the administra-

¹⁵ Compare the customary law of the mining country after 1849. *Jennison v. Kirk*, 98 U. S. 453, 457-458 (1878); Hughes, *The Evolution of Mining Law*, 24 Report of the American Bar Association, 220.

tion of justice and hence demand rules. But, as we have seen, at the beginning of the nineteenth century American law was undeveloped and uncertain. Administration of justice by lay judges, by executive officers, and by legislatures was crude, unequal, and often partisan, if not corrupt.¹⁶ The prime requirement was rule and system, whereby to guarantee uniformity, equality, and certainty.

Another reason for the insistence upon the exact working out of rules and the devotion to that end of the whole machinery of justice, which is so characteristic of nineteenth-century America, is to be found in jealousy of governmental action. A pioneer or a sparsely settled rural community is content with and prefers the necessary minimum of government. The social interests in general security, in security of acquisitions and in security of transactions, require a certain amount of governmental machinery. They require civil and criminal tribunals, and rules and standards of decision to be applied therein. But when every farm was for the most part sufficient unto itself, the chief concern was that the governmental agencies set up to secure these social interests might interfere unduly with individual interests. This pioneer jealousy of governmental action was reinforced in America from another quarter. Puritan influence had much to do with shaping originally the materials upon which we worked in making American law and American legal and political institutions. It had more to do with the way in which we worked them into an American common law.¹⁷ The age of Coke, the classical period of our Anglo-American common law, was the age of the Puritan in England. Indeed the parliament of the Commonwealth printed Coke's *Second Institute*, which is almost a text-book of our American bills of rights. And the period that ends with the Civil War, the formative period of American law, was the age of the Puritan in America.

The Puritan conceived of law as a guide to the individual conscience. The fundamental proposition from which he proceeded

¹⁶ Plumer, *Life of Wm. Plumer*, 170; John Adams, 2 Works, 283; Fisher, *New Jersey as a Royal Province*, ch. 8; Loyd, *Early Courts of Pennsylvania*, ch. 2, 3; Parker, C. J., in *Pierce v. State*, 13 N. H. 536, 557 (1843); Warren, *History of the American Bar*, ch. 1-6.

¹⁷ See my paper, *Puritanism and the Common Law*, 45 Am. Law Rev. 811.

was that man was a free moral agent with power to choose what he would do and a responsibility coincident with that power. Hence he put individual conscience and individual judgment in the first place. He believed that no authority should coerce them, but that everyone must assume and abide the consequences of the choice he was free to make. His principle of consociation rather than subordination¹⁸ demanded that a fixed, absolute, universal rule, which the individual had contracted to abide, be resorted to; not the will or discretion of the magistrate. It demanded that the state and the law interfere after action, but not before; it demanded judicial imposition of penalties upon one who had wilfully chosen the wrong course, not administrative compulsion to take the right course. Hence our polity developed an inconsistency that is part of the Puritan character. He rebelled against control of his will by state or magistrate, yet he loved to lay down rules, since he believed in the intrinsic sinfulness of human nature. In the same way we have devoted our whole energies to legislation and judicial law-making. At the same time, the enforcing agencies have not merely been neglected, they have been deliberately hampered, lest they interfere unduly with the individual free will.

Thus the chief problem of the formative period of American law was to discover and lay down rules; to develop a system of certain and detailed rules which, on the one hand, would meet the requirements of American life, and, on the other hand, would tie down the magistrate by leaving as little to his personal judgment and discretion as possible, would leave as much as possible to the initiative of the individual, and would keep down all governmental and official action to the minimum required for the harmonious coexistence of the individual and the whole. This problem determined the whole course of our legal development until the last quarter of the nineteenth century. Moreover it determined our system of courts and judicial organization. Above all else we sought to insure an efficient machine for the development of law by judicial decision. For a time this was the chief function of our highest courts. For a time it was meet that John Doe suffer for the commonwealth's sake. Often it was less important to decide the particular cause justly than to work out a sound and

¹⁸ "We are not over one another," said Robinson, "but with one another." See Lord Acton, *Lectures on Modern History*, 200. Cf. Mass., Bill of Rights, Art. 10.

just rule for the future. Hence for a century the chief energies of our courts were turned toward the development of our case law, and the judicial hierarchy was set up with this purpose in view.

A second problem of the formative period of American law was to decentralize the administration of justice so as to bring justice to every man in a sparsely settled community. The system of English courts at the time of the Revolution was too arbitrary and involved to serve as a model to be followed in detail in this country. But, overlooking concurrent jurisdictions, concurrent powers of review, and such anomalies as the writ of error to the Common Pleas from the King's Bench, a general outline could be perceived, which was the model of our several systems. To begin at the bottom, this was: (1) local peace magistrates and local inferior courts for petty causes, (2) a central court of general jurisdiction at law and over crimes, with provision for local trial of causes at circuit and review of civil trials in bank in the central court, (3) a central court of equity in which causes were heard in one place, though testimony was taken in the locality, and (4) a supreme court of review. In the United States, all but five or six jurisdictions merged the second and third. But with that salutary act of unification most of our jurisdictions stopped. Indeed for a season there was no need of unification. The defects in the foregoing scheme that appealed to the formative period of American judicial organization lay in the second and third of the tribunals above described, namely, the central court of law and the central court of equity. In a country of long distances in a period of slow communication and expensive travel, these central courts entailed intolerable expense upon litigants.¹⁹ It was a prime necessity to bring justice to every man's back door. The French judicial organization, local courts of first instance, district courts of appeal, and a central court of review, attracted attention, not only because of the great interest of the period in all things French, but because it suggested a means of localizing the administration of justice. The influence of the French system upon the federal judicial organization and upon the reorganization in New York in 1846

¹⁹ This is well brought out in the several constitutional conventions in New York. *Proceedings and Debates of the Convention for Amending the Constitution of New York, 1821*, 500-524; *Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846*, 559, 571, 574, 593, 595, 690, 695.

is obvious. But the model was English, at a time when English judicial organization was at its worst. Multiplicity of courts is characteristic of archaic law. Whenever any new type of cause arises, the primitive device is to set up a new court. The English judicial organization grew up in this way, so that when Coke wrote his Fourth Institute, he could describe seventy-four courts, seventeen of which did the work now done in England by three. We took an archaic system for a model, and the circumstances of the time in which our judicial system was wrought tended to foster a policy of multiplication. Accordingly in a time in which unification is sorely needed, the tendency to make new courts is still strong with us.

A hundred years ago, the problem seemed to be how to hold down the administration of punitive justice and protect the individual from oppression under the guise thereof, rather than how to make the criminal law an effective agency for securing social interests. English criminal law had been developed by judicial experience to meet violent crimes in a period of force and violence. Later, the necessities of more civilized times had led to the development in the court of Star Chamber of what is now the common law as to misdemeanors. Thus one part of the English law of crimes, as our fathers found it, was harsh and brutal, as befitted a law made to put down murder by violence, robbery, rape, and cattle-stealing in a rough and ready community.²⁰ Another part seemed to involve dangerous magisterial discretion, as might have been expected of a body of law made in the council of Tudor and Stuart kings in an age of extreme theories of royal prerogative.²¹ The colonists had had experience of the close connection of criminal law with politics. Hence not only were they concerned to do away with the brutalities of the old law as to felonies, but even more their constant fear of political oppression through the criminal law led them and the generations following, which had imbibed

²⁰ "For example what a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows, insomuch as if in a large field a man might see together all the Christians that but in one year throughout England come to that untimely and ignominious death, if there were any spark of grace or charity in him, it would make his heart to bleed for pity and compassion." Coke, *Epilogue to the Third Institute* (published 1644).

²¹ See the examples of unequal and arbitrary punishments given in 1 Stephen, *History of the Criminal Law*, 338-345.

their ideas, to exaggerate the complicated, expensive, and time-consuming machinery of a common-law prosecution, lest some safeguard of individual liberty be overlooked,²² to give excessive power to juries, and to limit or even cut off the power of the trial judge to control the trial and hold the jury to its province.²³ Nor did these enfeeblings of punitive justice work much evil in a time when crime was rare and abnormal, when the community did not require the swift moving punitive justice, adjusted to the task of enforcing a voluminous criminal code against a multitude of offenders, which we demand to-day.

To sum up, our American common-law polity presupposes a homogeneous population, which is jealous of its rights, zealous to enforce law and order, and in sympathy with the law and with the institutions of government. It presupposes a public which may be relied upon to set the machinery of the law in motion when wrong is done,²⁴ a people intrinsically law-abiding, which for the most

²² Cf. the remarks of Taney, C. J., in *United States v. Reid*, 12 How. (U. S.) 361, 364 (1851). See my paper, *The Ritual of Punitive Justice*, Proceedings of the Conference on Criminal Law and Criminology at Madison, Wis., Nov. 26-27, 1909, p. 36.

²³ Another influence coöperated here. "There are features of American democracy," says Professor Sumner, "which are inexplicable unless one understands this frontier society. Some of our greatest political abuses have come from transferring to our now large and crowded cities maxims and usages which were convenient and harmless in backwoods country towns." *Life of Andrew Jackson*, 7. This is quite as true of some of our abuses in legal procedure. See the observations of Mr. Justice Brown, 12 Report of the American Bar Association, 273; also my paper, *Some Principles of Procedural Reform*, 4 Ill. L. Rev. 388, 397. Many crudities in American judicial organization and procedure are legacies of the Jefferson Brick era of American politics. See Loyd, *Early Courts of Pennsylvania*, 149.

²⁴ Jhering has pointed this out in a characteristic passage: "What energy it [the feeling of legal right] still possesses . . . we . . . have frequently proof enough of, in the typical figure of the traveling Englishman who resists being duped by inn-keepers and hackmen with a manfulness which would induce one to think he was defending the law of old England — who, in case of need, postpones his departure, remains days in the place and spends ten times the amount he refuses to pay. The people laugh at him and do not understand him. It were better if they did understand him. For in the few shillings which the man here defends, old England lives. At home, in his own country, everyone understands him, and no one ventures lightly to overreach him. Place an Austrian of the same social position and the same means in the place of the Englishman — how would he act? If I can trust my own experience in this matter, not one in ten would follow the example of the Englishman. Others shun the disagreeableness of the controversy, the making of a sensation, the possibility of a sensation to which they might expose themselves, a misunderstanding which the Englishman in England need not at all fear, and which he quietly takes into the bargain: that is, they pay. But in the few pieces of silver which the English-

part will conform to rules of law when they are ascertained and made known, so that the chief concern of courts and of the state is to settle what the law is, and a people which may be relied upon to enforce the law intelligently and steadfastly upon juries. In other words, our common-law polity postulates an American farming community of the first half of the nineteenth century; a situation as far apart as the poles from what our legal system has had to meet in the endeavor to administer justice to great urban communities at the end of the nineteenth and in the twentieth century.²⁵

II.

What, then, are the problems of the administration of justice in an American city to-day? I think we may recognize eight: (1) to work out a system of legal administration of justice which will secure the social interest in the moral and social life of every individual under the circumstances of the modern city, upon the basis of rules and principles devised primarily to protect the interest in general security, in the security of acquisitions and the security of transactions, at a time when these were best protected by securing individual interests of substance; (2) to organize the administration of justice so that there may be an efficient machine to dispose of the great volume of litigation in the modern city, to enforce the great mass of police regulation required by the conditions of urban life, and make the criminal law effective to secure social interests; (3) to make adequate provision for petty litigation in communities where there is a huge volume of such litigation which must be dealt with adequately on pain of grievous denial of justice; (4) to apply and enforce law in a community where furnishing a guide to the individual conscience is not enough, where it is often of more importance to enforce rules vigorously but

man refuses and which the Austrian pays, there lies concealed more than one would think of England and Austria; there lie concealed centuries of their political development and of their social life." Jhering, *The Struggle for Law* (Lalor's transl.), 62-63. It must be obvious that a system of reliance upon individual initiative which grew up for the one type is quite inapplicable in a society of the other type.

²⁵ An experienced prosecutor in one of the largest cities in the country has stated that, in his experience, the average city juror "is a sort of don't-give-a-rap sort of fellow — he says 'let the fellow go.' He has no respect for the law." *Proceedings of the First National Conference on Criminal Law and Criminology*, 1909, 122.

intelligently than to insure that the rules made are the best possible, where, in other words, law requires sanction and must do much of the work of morals; (5) to apply and enforce law in a heterogeneous community, divided into classes with divergent interests, which understand each other none too well, containing elements hostile to government and order, containing elements ignorant of our institutions, on the one hand unable to understand our tenderness of individual liberty and on the other hand suspicious of authority and of magistrates; (6) to administer punitive justice in a community where the defective, the degenerate of decadent stocks, and the ignorant or enfeebled victim of severe economic pressure are exposed to temptations and afforded opportunities beyond anything our fathers could have conceived, where the professional criminal and the promoter and the victim of commercialized vice must be reckoned with, — and this upon the basis of legal principles worked out for the occasional criminal, the criminal of passion, and the rough virile vice of a vigorous stock that lived out of doors; (7) to administer justice in relations of family life, where conditions of crowded urban life and economic pressure threaten the security of the social institutions of marriage and the family; and (8) to unshackle administration from the bonds imposed when men who had little experience of popular government and much experience of royal government, in their desire to have a government of laws and not of men, sought to make law do the work of administration.

Let us look briefly at some of these problems.

Demand for socialization of law, in America, has come almost wholly if not entirely from the city. We have no class of agricultural laborers demanding protection. The call to protect men from themselves, to regulate housing, to enforce sanitation, to inspect the supply of milk, to prevent imposition upon ignorant and credulous immigrants, to regulate conditions and hours of labor and provide a minimum wage, and the conditions that require us to heed this call, have come from the cities. But our legal system has had to meet this demand upon the basis of rules and principles developed for rural communities or small towns, — for men who needed no protection other than against aggression and overreaching between equals dealing in matters which each

understood. Less than a generation ago we were echoing the outcry of our fathers against governmental paternalism.²⁶ To-day, not only have we swung over to this condition in large measure, as our increasing apparatus of commissions and boards and inspectors testifies every day, but we are beginning to call for what has been styled governmental maternalism²⁷ to meet the conditions of our great urban communities. Although much has been done and comparatively rapid progress is now making, it is perhaps still a chief problem how to achieve these results through orderly development of a traditional legal system which has evolved for centuries along purely individualist lines.

Again, the demand for organization of justice and improvement of legal procedure comes from our cities. It is a significant circumstance that in the debates upon this subject in the past six years in our bar associations, national and state, the city lawyer has asserted that reform was imperative, while the country lawyer has contended that the evils were greatly exaggerated and that grave changes were wholly unnecessary; the city lawyer has been urging ambitious programs of reform and the country lawyer has been defeating them. A modern judicial organization and a modern procedure would, indeed, be a real service to country as well as to city. But the pressure comes from the city, to which we are vainly endeavoring to adjust the old machinery.

Courts in our great cities as they are now organized are subjected to almost overwhelming pressure by an accumulated mass of litigation. Usually they sit almost the year round, and yet they tire out parties and witnesses with long delays, and in some jurisdictions dispose of much of their business so hastily or imperfectly that reversals and retrials are continually required. Such a condition may be found in the courts of general jurisdiction in practically all of our cities. To deal adequately with the civil litigation of a city, to enforce the mass of police regulations required by conditions of urban life, and to make the criminal law effective to secure social interests, we must obviate waste of judicial power, save time, and conserve effort. There was no need of this when

²⁶ *Lowe v. Rees Printing Co.*, 41 Neb. 127, 135 (1900); *State v. Kreutzberg*, 114 Wis. 530, 537 (1902); *People v. Coler*, 166 N. Y. 1, 14 (1901).

²⁷ See Jethro Brown, *Underlying Principles of Modern Legislation*, 171-177.

our judicial system was framed. There is often little need of it in the country to-day. In the city, the waste of time and energy in doing things that are wholly unnecessary results in denial of justice.²⁸

Two signal cases of waste of judicial power, the multiplicity of independent tribunals and the vicious practice of rapid rotation, which prevails in the great majority of jurisdictions, whereby no one judge acquires a thorough experience of any one class of business, may only be noticed. As an example of the possibilities of the first, it has been observed that in Chicago to-day, at one and the same time, the Juvenile Court, passing on the delinquent children; a court of equity, entertaining a suit for divorce, alimony and the custody of children; a court of law, entertaining an action for necessities furnished an abandoned wife by a grocer; and the criminal court or domestic relations court, in a prosecution for desertion of wife and child, — may all be dealing piecemeal at the same time with different phases of the same difficulties of the same family.²⁹

²⁸ "Our methods have not been devised for the purpose of saving time and conserving effort. We waste time and effort in doing wholly unnecessary things. . . . No one is sure of what the result of a law suit is going to be, nor is anyone certain that the result may not be overturned on appeal for some reason which does not touch the real merits of the controversy. The time which we spend in court unnecessarily at the motion hour and on the trial call, if it could be turned into money, would represent an aggregate in dollars and cents sufficient to endow and maintain a pension system for superannuated lawyers. Our clients are going to trust companies, accident insurance companies and title guarantee companies simply because these corporations can give them what they want at less cost or with less risk than we can and they are resorting to trade arbitrations or are charging off their contested claims to profit and loss because of the loss, delay, uncertainty and expense of enforcing their rights in the courts." Report of the President (Edgar B. Tolman, Esq.), Chicago Bar Association Annual Reports, 1912, 12.

²⁹ While the institution of the Municipal Court of Chicago, in 1906, marked a distinct advance in judicial organization in America in that the court was given an administrative head with power to control its administrative agencies, utilize its personnel for the speedy disposition of business as the exigencies of business might require, and adjust its organization from time to time to the demands of its work; was given full power to make rules of procedure; and was not hampered by detailed legislative provisions as to practice; it is unfortunate that the occasion was not seized to unify and reorganize the entire judicial system. Municipal courts in imitation of the one in Chicago are becoming common. But, excellent as they are in comparison with the old magistrates' courts which they supersede, it is a misfortune to add another court to a system which already involves too many. There are some sensible remarks upon this subject in the Report of the Special Committee on the Judicial System of Philadelphia County, presented to the Law Association of Philadelphia,

The second, its causes and its results, are treated thoroughly by Mr. Kales in a recent paper.³⁰ Suffice it to say that one phase of the evil has reached such proportions in New York City as to be the subject of a report by a committee of the Bar Association. In that report we may read how different proceedings in a single cause have been heard before twenty-two different justices.³¹ Till such things are cured in the only way in which they can be cured permanently, namely, by a modern organization of the judicial department, under a head with power and responsibility, little can be done to make the law in action an efficient agency of justice.

Moreover, the great cost of administration of justice in the modern city by methods devised for wholly different conditions is a serious consideration. The enormous sums of money which we spend each year in the judicial administration of justice must eventually invite critical scrutiny of the mode in which these sums are employed. Social legislation is requiring, and will continue to require, increased expenditures and exacting taxation. Every source of expense that competes with the demands of this legislation upon which men's hearts are set will soon be compelled to justify itself by economy and efficiency. In this respect Chicago has furnished a model in its Municipal Court. What that court has done, in its limited field, shows how much might be done by a thoroughly organized judicial department for the whole commonwealth.³²

December 3, 1912, p. 11. See my paper, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Report of the American Bar Association, 578, 589-595.

³⁰ Reorganization of the Circuit and Superior Courts of Cook County, 7 Ill. L. Rev. 218.

³¹ Proposal for Calendar System for New York County Based on the Principle of One Judge to One Case (Report of Sub-Committee of the Committee on Law Reform of the Association of the Bar of the City of New York), 1912. A change has recently been made in the Children's Courts of New York City whereby a single judge will sit continuously and become responsible for the whole work in those courts. The prior practice had been to have a large number of judges of the Court of Special Sessions sit in rotation in the Children's Courts for one month at a time. In Philadelphia the practice of rotation of judges who serve for short periods only in the Juvenile Court is regarded as a grave defect in judicial administration.

³² The annual reports of the Municipal Court of Chicago, of which five have been published, deserve thorough study by all who are interested in the problem of judicial

A third problem is to make adequate provision for petty litigation, to provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language, necessarily engenders. It is here that the administration of justice touches immediately the greatest number of people. It is here that the great mass of an urban population, whose experience of the law in the past has been too often experience only of the arbitrary discretion of police officers, might be made to feel that the law is a living force for securing their individual as well as their collective interests. For there is a strong social interest in the moral and social life of the individual. If the will of the individual is subjected arbitrarily to the will of others because the means of protection are too cumbrous and expensive to be available for one of his means against an aggressive opponent who has the means or the inclination to resist, there is an injury to society at large. The most real grievance of the mass of the people against American law is not with respect to the rules of substantive law, but rather with respect to the enforcing machinery, which too often makes the best of rules nugatory in action.

In Chicago this situation has been met and well met by the Municipal Court. After six years, that court is still unique in this country as an example of a thoroughly organized modern court with power to make the law an effective instrument of justice.³³ But the country at large still halts; for none of the mu-

organization. In 1911, the last year for which we have a report, 53,223 civil cases were brought in that court, of which 50,931 had been disposed of at the end of the year. During the year, the court rendered money judgments in civil cases amounting to \$4,096,254.28, an amount equal to the sum of the judgments rendered during the same period by the High Court of Justice in England. But during the same period the court had before it and disposed of 9,526 prosecutions for felonies, 11,770 prosecutions for misdemeanors, and 71,434 prosecutions or penal actions for violation of city ordinances, a total of 92,730. In other words, this court of twenty-eight judges, thanks to a modern organization and simple procedure, disposed in 1911 of 145,953 causes. Fifth Annual Report of the Municipal Court of Chicago, 10, 77, 87, 91. This is the only court, as yet, in this country which is so organized as to be able to furnish adequate statistics of judicial administration.

³³ For example, in 1911, pursuant to a plan formulated by a committee of the judges a branch was organized, known as the Domestic Relations Court. "It required no new laws to provide for the establishment of this branch, the existing laws . . . being sufficient. Section four of the Municipal Court Act provides that 'as many

municipal courts that have sprung up in the wake of the Municipal Court of Chicago has been given a like organization or conceded like powers of doing justice. Hence it seems expedient to search for the causes of our general neglect of the petty litigation, as we disparagingly term it, of the mass of our city population. For, taking the country as a whole, it is so obvious that we have almost ceased to remark it, that in petty causes, that is with respect to the everyday rights and wrongs of the great majority of an urban community, the machinery whereby rights are secured practically defeats rights by making it impracticable to assert them when they are infringed. Indeed in a measure this is so in all causes. But what is merely exasperating in large causes is downright prohibitive in small causes. While in theory we have a perfect equality, in result, unless one can afford expensive and time-consuming litigation, he must constantly forego undoubted rights, to which in form the rules of law give full security, but for which, except where large sums are involved, the actual conduct of litigation affords no practicable remedy.

Many causes have contributed to this neglect of provision for petty litigation, which disgraces American justice. One has been noticed in another connection. We have had to devise a body of substantive law for large causes and small alike in an age of rapid growth and rapid change. We have studied the making of law

branch courts shall be held in each district as may be determined by the Chief Justice to be necessary for the prompt and proper disposition of the business of the court. . . . Such branch court may be given such designation by number or otherwise, as may be determined by the Chief Justice.' . . . Section 8 of the Municipal Court Act provides further that 'the Chief Justice shall also superintend the preparation of the calendars of cases for trial in said court and shall make such classification and distribution of the same upon different calendars as he shall deem proper and expedient.'" Fifth Report of the Municipal Court of Chicago, 68. Under these provisions, the court has been able so to arrange and classify its business, improving the scheme from time to time, as dictated by experience, as to make the Domestic Relations Court, in one year, an effective agency of social improvement. The statistics on pages 68-73 of the report cited deserve study both by lawyers and by sociologists. It should be noted that in this court the jurisdiction can be broadened or narrowed and the number of judges increased or decreased simply by rule of court, as experience in the conduct of its business shows to be expedient. In these respects there is manifest advantage over the Domestic Relations Court in New York City in which these things are prescribed in detail by statute. *Laws of New York, 1910, ch. 659, § 74.* See a good account of the Chicago Court by Chief Justice Olson in *The Survey, Aug. 19, 1911, p. 739.*

sedulously. For more than a century in America we have been engaged in developing by judicial experience a body of principles and a body of rules as logical deductions therefrom to accord as nearly as may be with the requirements of justice. This is true especially of that most important part of our law which is to be found in the reports of adjudicated cases. Almost the whole energy of our judicial system has been employed in working out a consistent, logical, minutely precise body of precedents. The important part of our system has not been the trial judge who dispenses justice to litigants, but the justice of the appellate court who uses the litigation as a means of developing the law; and we judge the system by the output of written opinions, and not by the actual results *inter partes* in actual causes. We seem to have assumed that when well made, law will enforce itself. On the whole, notwithstanding some notable mistakes here and there, our courts have done their work of law-making well. But while our eyes have been fixed upon the rules, which are but the means of achieving justice, the application of the rules, the results which we obtain every day in concrete causes, have escaped our attention.³⁴ If the dilatory and expensive machinery of enforcement succeeds finally in applying the principle to the cause, we may be assured that in the very great majority of causes the abstract result will be what it should be. But our failure to devote equal attention to application and enforcement of law has too often allowed the machinery designed to give effect to legal rules to defeat the end of law in its actual operation. The whole life of the law is

³⁴ This seems to be an inevitable incident of development of a legal system by juristic science and judicial experience. "There is a real and constant opposition between the interests of the suitor and the tendency of scientific law. . . . Legal conceptions, however you may define and explain, will not have the same content in all minds, and the facts to which they are applied will wear a different aspect according to the presumptions which the judge brings to bear on them. The more thoroughly a matter is investigated, the more fully it is compared with other cases, the more the application of different legal principles or categories to it is discussed, the greater chance there would appear to be of the right decision being arrived at in the particular case and of the general law being set in clearer light. But the process is long and costly, and, cases being thus selected only by accident, the general improvement of the law is very slight and very slow. The suitor's real interest is forgotten." Roby, Introduction to Justinian's Digest, xviii-xix. "Suitors take no interest in law as a science. They merely desire to have a decision in the case in which they are interested. They are not concerned with what has happened or may happen in any other matter." Sir John Hollams, Jottings of an Old Solicitor, 161.

in its enforcement, and this, not the abstract content of the legal system, must receive our best attention in the immediate future.

Perhaps a second reason is that our law has had a too exclusively professional development in the immediate past. One of the inherent dangers of all system and all science is that system and science, which are but means, will be taken for ends and that system will be perfected purely for its own sake. Something of this sort happened in American law in the nineteenth century. Not long ago an excellent judge in one of the great cities of the country objected to the Juvenile Court on the ground that it was not a court at all; a court was, he said, a place where justice was judicially administered, and as he had learned these terms from his books, what was meted out in a Juvenile Court was not justice, since it varied with the case and the person, and was not administered judicially, since it was administered not according to rule but according to almost uncontrolled discretion. Another judge, to whom I showed recently the last report of the Municipal Court of Chicago, when he saw that the court had a general superintendent, that it kept statistics and devoted much attention to proper gathering of them, study of them, and embodying the lessons they had to teach in rules, that it maintained a bureau of information, instead of compelling the citizen to guess and then deciding after argument whether he had guessed right, — when, I say, he saw these startling things in the report, — threw it down exclaiming, “but that isn’t a court, that’s a cross between an imperial ministry of justice and a legal aid society.” And in a sense it is. But that is what a municipal court must be in a large city. In such a court direct access to the court, through proper officers, should be possible and easy.

For ordinary causes our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give as a right. An example of what we might do is at hand. In this country we have few judges and many lawyers. Germany has many judges and few lawyers. The reason is that the Germans cast upon the court much for which we rely upon the lawyers. Thus they put upon the judge the duty of ascertaining and formu-

lating the claims of the parties.³⁵ Such a system is inapplicable to our superior courts or to considerable causes in a municipal court. But we have developed something of the sort in probate courts in many parts of the country, and a judicious adaptation and further development seems to be necessary to justice in petty causes.

In the higher courts, lawyers of experience on each side will be watchful to see that the claims of the parties are well presented, that the court is fully informed, and that justice is done so far as skilful advocacy may secure it. In petty causes there ought to be no expensive advocacy. One side or the other, unless the game of litigation is played for pure pleasure, cannot afford it. The court, therefore, has no assistance, or no adequate assistance. Hence the judge cannot be a mere umpire. He must actively seek the truth and the law, largely if not wholly unaided. The lay vision of every man his own lawyer has been shown by all experience to be an illusion. The other extreme, a professional lawyer for every man, has no place in petty litigation. The alternative is a judge who represents both parties and the law, and a procedure which will permit him to do so effectively. No doubt he should have assistance in the way of clerks, who may save valuable judicial time by showing parties how to present their respective claims. At any rate our first concern in a people's court is a procedure that will help parties assert and secure their rights, and to get away from the involved and over-mechanical procedure which has become in so many jurisdictions a means afforded each party of hindering the other in his search for justice. The law needs perennially an infusion of ideas from outside of professional thought. Happily the Municipal Court Act for Chicago was so drawn as to permit such things, and Judge Olson knew how to look beyond the lines of everyday professional thinking, and had the courage to undertake the simple but revolutionary improvements that make his court not merely a machine for deciding cases but a bureau of justice.³⁶

³⁵ See Karl von Lewinski, *Courts and Procedure in Germany*, 5 Ill. L. Rev. 193.

³⁶ The court has unlimited jurisdiction of actions upon contract, and of actions for conversion of or injury to personal property, and by construction of the statute, unlimited jurisdiction in actions against carriers of passengers for personal injuries, besides general jurisdiction of all causes where the amount claimed by the plaintiff

A third reason is that our procedure has largely been determined by the conditions of rural communities of seventy-five or one hundred years ago. Hence when better provision for petty litigation is urged, many repeat the stock saying that litigation ought to be discouraged. It will not do to say to the population of modern cities that the practical cutting off of all petty litigation, by which theoretically the rights of the average man are to be maintained, is a good thing because litigation ought to be discouraged. Litigation for the sake of litigation ought to be discouraged. But this is the only form of petty litigation which survives the discouragements involved in American judicial organization and procedure. In truth the idea that litigation is to be discouraged, proper enough, in so far as it refers to amicable adjustment of what ought to be so adjusted, has its roots chiefly in the obvious futility of litigation under the conditions of procedure which have obtained in the immediate past. The idea is much more appropriate to agricultural communities, where in intervals of work the farmer, remote from the distractions of city life, found his theatre in the court house and looked to politics and litigation for amusement, than to modern urban communities.³⁷ Moreover there is danger that in discouraging litigation we encourage wrong-doing, and it requires very little experience

does not exceed \$1000, and a general magistrates' jurisdiction. See Second Annual Report of the Municipal Court of Chicago, 11-13. The police officers of the city are *ex officio* deputy bailiffs of the court. It maintains a bureau of information, to which the citizen may apply to learn what the court can do for him and how to apply for its assistance. But the judges also do much of this work. In 1911, the judge assigned to the Court of Domestic Relations had 1673 different "interviews" of this sort. The report says: "An effort is made in every case to properly direct persons who have complaints over which this court has no jurisdiction. Many people come for advice only. In many cases husbands and wives have come in together to have differences settled, in which case the Judge or the State's Attorney instructs them as to their obligations and rights." The court has also a woman "social secretary" to whom women may apply in matters of delicacy. Fifth Report, 71-72.

³⁷ See Torrey, *A Lawyer's Recollections*, ch. 3. What has been called "the sporting theory of justice," the idea that judicial administration of justice is a game to be played to the bitter end as a football game might be, has its roots, no doubt, in Anglo-American character and is closely connected with the individualism of the common law. But it was fostered by the rural attitude toward litigation. Torrey says: "In fact many of these legal trials at the time were looked upon as huge jokes." Again: "These proceedings would be called rather sharp practice in these days, but they were very common at that time and, as I have already said, the whole contest was looked upon as a contest of wits." *A Lawyer's Recollections*, 120, 122.

in the legal aid societies in any of our cities to teach us that we have been doing that very thing. Of all peoples in the world we ought to have been the most solicitous for the petty litigation of the poor. Unhappily, except as the organization of municipal courts in recent years has been bringing about a change, we have been callous to the just claims of this type of controversies.

A fourth reason is that upon obvious grounds the legal profession has very little interest in petty causes. May it not be that we have been assuming too lightly that what is unprofitable for the lawyer is unprofitable for the law?

A fifth reason is fear of the wide discretion and free scope for judicial action which are necessary to the administration of justice in small causes. This must be spoken of again presently in another connection. Enough has been said to show that serious obstacles have stood and still stand in the way of adequate provision for this class of controversies. How to make the law effective for its purpose in action is a difficult problem throughout the domain of law. It is doubly difficult in petty causes, because such causes, from their very nature, require the simplest and cheapest enforcing machinery consistent with law and justice, and nothing seems to have been so hard to attain in legal procedure as simplicity and cheapness.

Application and enforcement of law are now regarded as the central questions in modern legal science. These questions are especially acute in America because our polity commits matters to the courts which elsewhere are left to the executive and the legislative departments, and in American cities because in these cities the demands made of the courts increase continually. In these communities the conception of law as a guide to the individual conscience is wholly inadequate. What the past left to the home and to the church, we are compelled more and more to commit to the law and to the courts. The circumstances of city life and the modern feeling that law is a product of conscious and determinate human will put a larger burden upon the law, and hence upon the agencies that administer the law, than either has been prepared to bear. This is the more apparent in application and enforcement of law in a heterogeneous community. Our common law assumed that there were no classes and that normally men

dealt with one another on equal terms and at arm's-length.³⁸ It assumed also that every normal part of the community was zealous to uphold the law and content to abide it. Not a little friction has resulted from application of rules based upon this theoretical equality in communities divided into classes with divergent interests. A great deal of ineffectiveness has come from application of common-law principles to elements of the city population which do not understand our individualism and our tenderness of individual liberty, and from reliance upon individual initiative in case of other elements which by instinct and training are suspicious of authority and of magistrates. Mr. Train's recent book shows vividly how fear of courts, bred of conditions in another land, leads immigrants to tolerate gross oppression rather than to go to the law for relief.³⁹

Administration of justice in relations of family life is difficult, for two reasons. One is that the questions involved are largely questions of human conduct, of the border line between law and morals, a field where law, from its very nature, is least efficacious. The other is that in dealing with such relations judicially a very considerable discretion is needed and yet they involve matters more tender than any that can come before tribunals. The powers of the court of Star Chamber were a bagatelle compared with those of American Juvenile Courts and Courts of Domestic Relations. If those courts chose to act arbitrarily and oppressively they could cause a revolution quite as easily as did the former. The powers which we are compelled to entrust to them call for the strongest judges we can put upon the bench.⁴⁰

Finally, there is the problem of freeing administration from the rigid limitations imposed in the eighteenth century, and by imitation in all our constitutions down to the end of the nineteenth century, through fear of executive tyranny. In the eighteenth

³⁸ This was brought out repeatedly in the older decisions on liberty of contract. *Godcharles v. Wigeman*, 113 Pa. St. 431 (1886); *Frorer v. People*, 141 Ill. 171, 186 (1892); *State v. Loomis*, 115 Mo. 307 (1870); *People v. Beck*, 10 N. Y. Misc. 77 (1880) (opinion of White, J.).

³⁹ Courts, Criminals, and the Camorra, chap. ix., especially pp. 219, 222-225, 229-230, 234-235.

⁴⁰ See the remarks of Frick, J., in *Mill v. Brown*, 31 Utah 473, 486-488 (1907). Also the testimony of Judge Pinckney, quoted in Breckinridge and Abbott, *The Delinquent Child and the Home*, 202 *et seq.*

century, separation of powers and a system of checks and balances were regarded as essential to liberty; as absolute and fundamental principles of law and of politics. Accordingly the framers of our constitutions, state and federal, sought to make them the basis of our government. But the attempt to make an exact analytical scheme of the powers of government according to the threefold division has broken down. For sovereignty is a unit. The so-called three powers are not three distinct things: they are three general types of manifestation of one power. In the development of sovereignty, these three types have been differentiated gradually as a result of experience that certain things, which demand special competency or special training or special attention, are done better by those who devote thereto their whole time or their whole attention for the time being. The principle involved, therefore, is no more than the principle involved in all specialization. If the officers of a court may best gather and study statistics of judicial administration to the end that such administration be improved, if to that end they may best conduct laboratories for criminological research, there is nothing in the nature of a court to prevent. Whether such things shall be done by a ministry of justice or by attachés of a tribunal is a question of mere expediency. But above this, to secure social interests in the modern city we must greatly enlarge the scope of administration. For reasons already suggested, the Anglo-American started out to leave to the courts what in other lands was committed to administration and inspection and executive supervision. He was averse to inspection and supervision in advance of action, preferring to show the individual his duty by a general law, to leave him free to act according to his judgment, and to prosecute him and impose the predetermined penalty in case his free action infringed the law. This attempt to confine administrative action to the inevitable minimum, which originally was fundamental in our polity, resulted in the nineteenth century in a multitude of rules which hindered as against few which helped. Regulation of public utilities, factory inspection, food inspection, tenement-house inspection, and building laws are compelling us to turn more and more from the criminal law to administrative prevention.⁴¹ Yet such prevention still

⁴¹ See Professor Commons' account of the Wisconsin Industrial Commission (the only complete account yet published) in *The Survey*, January 4, 1913, p. 440. It

usually requires judicial action to make it effective. On the other hand, in the reaction from the extravagant judicial control of the last century there is danger that we withdraw these matters wholly from the domain of law. To work out an adequate system of administrative law is not the least of the tasks of the immediate future.

III.

So much for the problems. Some of the difficulties they involve have been mentioned incidentally. But a few demand further notice.

One difficulty which is gradually remedying is the *Weltanschauung*, if one may so express it, of the traditional element of our legal system. A developed legal system is made up of two elements—a traditional element and an enacted or imperative element. Of these the former is by far the more important. We must rely upon it to meet all new questions in the first instance, for the legislator is rarely able to anticipate them. Moreover the legislator is seldom able to do more than lay out a broad outline. Hence the traditional element plays a chief part even in the field of enacted law. It is drawn upon to supply the gaps in legislation, to develop the principles introduced by legislation, to interpret legislation. In the large field unappropriated by enactment it is supreme. It is obvious, then, that above all else the condition of the law depends upon the condition of this element of the legal system. Undoubtedly a change is taking place. Gradually the traditional element of our law is absorbing and being made over by the economics and social science of to-day. But the process is necessarily slow, and for a time it was obstinately resisted. Not a little of the present dissatisfaction with our courts is based upon decisions of the end of the last century, when the finality of

is suggestive that this commission is made an "appellate administrative court." See also First Comparative Report of the Administration of Labor Laws, International Association for Labor Legislation, 1911; McNeill, The Massachusetts Board of Boiler Rules, Davies, Safety Inspection in Illinois, 1 American Labor Legislation Review, No. 4; Kingsbury, Labor Laws and their Enforcement; Austin, Administration of Labor Laws, Legislative Review No. 3, American Association for Labor Legislation; Downey, Regulation of Urban Utilities in Iowa, Iowa Applied History Series, III, No. 3, 81-86.

the common law was a received dogma. Fortunately few courts, if any, would render these decisions to-day.⁴²

A second and no less serious difficulty is to be found in our bills of rights. It is not to be forgotten that these provisions were often designed to prevent the state from interfering with the maximum of individual self-assertion. Both by bills of rights and by separation of powers and checks and balances, the eighteenth century and the pioneer or rural communities of the nineteenth century, from which our constitutions so largely proceed, sought to hold down all the activities of government. On the contrary the conditions of modern city life call upon us to set them free and to make government an instrument of securing social interests which are endangered by individual freedom of action. The administration of justice feels the strain of this situation acutely.

A difficulty no less serious, but often overlooked, is that justice in the city has often been reviewed and thus dictated from without. In the states which include large cities the greater share of the litigation that comes before the highest court is city litigation. Yet in these same courts country judges often largely preponderate. Nor is this all. Almost universally these courts sit, not in the chief city of the state, but in a relatively small town, where the atmosphere is anything but metropolitan. Mr. Bryce has remarked the influence of a capital upon legislation:

"It is true, that under a representative government power rests with those whom the people have sent up from all parts of the country. Still these members of the legislature reside in the capital and cannot but feel the steady pressure of its prevailing sentiment, which touches them socially at every point."⁴³

This is no less true of a court. If its members reside at the capital, they are likely to absorb the ideas of the capital; if, as in Illinois (where the Supreme Court has attained a bad eminence in its treatment of social legislation), they reside in their several districts, and but one is habitually in touch with the city, it may be predicted that but one will be filled with the ideas of the city, and that the others will reflect rather the ideas of the country or of the small town. Almost all of the backwardness of American

⁴² See my paper, *Social Problems and the Courts*, 18 *Am. Journal of Sociology*, 331.

⁴³ 2 *American Commonwealth*, 2 ed., 855-856.

courts with respect to social problems and social legislation has been backwardness with respect to social problems of our cities and social legislation for our cities. Is it not obvious what a difference it would have made if the everyday social relations of the judges of our highest courts had been in New York instead of Albany, Chicago instead of Springfield, St. Louis instead of Jefferson City, and so on? Is it likely that a court sitting in New York City would have gone wrong in construing tenement-house legislation?⁴⁴ Questions may well seem abstract and academic in Albany or Springfield that are concrete and practical in New York or Chicago. Judges there may well fail to appreciate the practical aspects of legislation which a court sitting in the metropolis, whose judges met and talked with social workers in the ordinary intercourse of society, would perceive. Our rural capitals are not a little to be blamed if the course of justice in our highest courts with respect to urban problems has been guided largely by judges who looked at them through rural spectacles.

Thus the Supreme Court of Illinois, in dealing with the abbreviated records of the Municipal Court of Chicago, seemed to have in mind the record made by a clerk from a judge's minutes in a court which numbers its cases by tens and hundreds — a system quite impossible in a court that disposes of cases by the ten thousands.⁴⁵ Here again it is significant that the one judge who lived in or about Chicago dissented. He might have said to the majority that in the most technical period of the common law, when records had to be engrossed laboriously upon valuable parchment, abbreviations of words and contractions were a matter of course. So much are these things determined by circumstances of time and place.

We have harped too much on supposed class feeling of judges, on sinister influences behind the choice of judges and bad men in judicial office, and on the mechanics of getting judges off of the bench. All these things are trifles in comparison with our received juristic tradition as it has been taught and handed down, and our judicial organization whereby the administration of law for urban communities is reviewed and thus dictated by men who

⁴⁴ *Grimmer v. Tenement House Department*, 204 N. Y. 370, 205 N. Y. 549 (1912). See Dr. Devine's comments in *The Survey*, March 9, 1912.

⁴⁵ *Stein v. Meyers*, 253 Ill. 199 (1912).

have no experience or knowledge of the social problems of those communities.

Another difficulty is that we assume a petty judge is good enough for petty causes. In these cases we must have free scope for the good sense of the judge, tempered by knowledge of the law, trained reason and experience of many causes, or we must deny justice. The usual American plan of trial in the first instance by a lay magistrate, followed, since he is not trusted, by a retrial to a jury in a higher court on appeal, and then followed by review in an appellate court, is indefensible. There should be but one trial, and but one review of that trial.⁴⁶ But if this is to be the practice, the judges of first instance must be equal to the responsibility involved. In this respect the English provision for county judges should be our model. The highest court does not require better judges than the lowest, when the lowest is given effective powers of doing justice.⁴⁷

In conclusion, to make the administration of justice in the modern city what it should be, we must have, first, more thorough knowledge of the social conditions in our cities, for which law must be devised and to which it must be applied. We must have sociological teaching and study of the law and of the theories upon which law shall proceed. Second, we must have a much larger degree of municipal autonomy and at least a fair proportion of city judges upon our highest courts. Third, we must organize the judicial department as a unit; give it an administrative head with power to prevent waste of public time and public money and to direct the whole energies of the judicial organization to its work for the time being, and with responsibilities corresponding to this power; give it strong judges to whom large powers may be safely entrusted; give it full control of its clerical and executive force, and power to utilize this force as experience dictates to further the purposes of judicial administration.⁴⁸ Finally, we must not be

⁴⁶ Appeals from the Municipal Court of Chicago go direct to the Appellate Court. There has been a movement to provide an appellate branch or division in the court itself.

⁴⁷ On the subject of organization and personnel of courts in its relation to petty causes, see Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, 34 Report of the American Bar Association, 578, 589-595.

⁴⁸ See the report last referred to, p. 591.

in too great a hurry. These are not things which can be brought about by legislative fiat day after to-morrow. The social interest in scientific administration of justice is much greater than the public commonly conceives. We must not overturn what has been built up by judicial experience. We must rather learn how to use it. The social science of to-day is largely unlearning that of yesterday. We must not bring our law so thoroughly up to date to-day that it will be out of date to-morrow.

Roscoe Pound.

HARVARD LAW SCHOOL.

THE DATE AND AUTHORSHIP OF THE STATUTE OF FRAUDS.

IT is an astonishing fact that the authorship¹ of the Statute of Frauds has not in the past been wholly clear, and will never perhaps be fully known, and it is even more strange that there has been a long standing misapprehension as to the exact date of its passage. Mr. Browne in his treatise on the Statute of Frauds assigns no date to the statute, and in the various case-books and text-books in which the statute is referred to by date the dates given vary. The reasons for that variance are found (1) in the change in the calendar which took place in England long after the Statute of Frauds was passed but before the Cambridge edition of 1763 of the Statutes at Large, (2) in the practical inaccessibility of the journals of the Houses of Parliament until their publication by authority in 1803, (3) in the fact that while the edition of the English statutes published in 1819 adopted 1677 as the date of the Statute of Frauds, the Cambridge edition of 1763 gave it as 1676, and (4) in the natural temptation for writers to accept without question any date which had been adopted in the edition of statutes consulted by them or accepted by persons of repute as correct, and into which the phrase "29 Car. II" seemed fairly translatable.

I. THE DATE OF THE STATUTE.

As late as 1884¹ as careful a writer as Mr. James Schouler discussed the date of the passage of the Statute of Frauds as one of probabilities and concluded that it must have been passed in 1676. That conclusion is erroneous, as will presently be seen, but his line of argument so fully explains the grounds of the most widely accepted guess as to the date of the statute that it seems desirable to quote his words. He said:

"Turning then to the British Statutes at Large of this early period, we find that the Cambridge edition of 1763 dates all the acts of 29 Car.

¹ "The Authorship of the Statute of Frauds," 18 AM. L. REV. 442.

II as of 1676; while the later 'Statutes of the Realm,' printed in 1819, under the authority of Parliament, styles them all as of 1677. Neither of these statements is strictly correct, for the year 29 Car. II is properly 1676-77, just as the new year of our national administration would be 1884-85. The precise method of giving the royal assent to acts of Parliament so soon after the downfall of the Commonwealth may be a matter of some doubt; but we presume that the years of Car. II were reckoned from the date of the King's birthday and his restoration, — *i. e.* May 29, — a day which the legislature had lately declared should be observed for a perpetual anniversary. The Statute of Frauds stands the third in order among ten acts which belonged then to this royal year of May, 1676-77; and hence we may assume that the measure had finally passed the two Houses long before the Christmas holidays of 1676 and quite probably about midsummer. The act by its own terms is declared to take effect from June 24, 1677; an indication, apparently, as to provisions so important that it went through Parliament about a year earlier."²

The purpose of Mr. Schouler's argument was to justify the view that Sir Matthew Hale, who died on Christmas day, 1676, played a preëminent part in shaping the Statute of Frauds, as tradition had said that he did, and specifically that Lord Mansfield's conclusion that Sir Matthew Hale did not draw the act,³ was an error.

Putting to one side for the present the question of authorship, there is no doubt that Lord Mansfield was right as to the time of the passage of the Statute of Frauds. Not only was Sir Matthew Hale dead before it passed, but he was dead even before that first

² 18 AM. L. REV. 442, 443. In Chase's Blackstone, 3 ed., 1084, it is stated, however, that "Although Charles II. did not ascend the throne until 1660, 29th of May, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth of his reign."

³ "It has been said that 'this act of 29 C. 2. c. 3. was drawn by Ld. Ch. J. Hale.' But this is scarce probable. It was not passed till after his death; and it was brought in, in the common way; and not upon any reference to the judges." Lord Mansfield in *Windham v. Chetwynd*, 1 Burr. 414, 418 (1757). In the report of *Wyndham v. Chetwynd*, found in 1 W. Bl. 95, 97, it is stated that "On the Argument, Lord Mansfield, Chief Justice, expressed his Doubts of that generally received Opinion, that Lord Hale drew the Statute of Frauds, 29 Car. 2., he having died in 1676, 28 Car. 2." In his opinion Lord Mansfield added: "I can never conceive, for the Reasons I formerly mentioned, that this Statute was drawn by Lord Hale; any farther than by perhaps leaving some loose Notes behind him, which were afterwards unskilfully digested." 1 W. Bl. 95, 98-99.

reading of the bill in the House of Lords which was followed by the successive legislative steps resulting in its final passage by both Houses and its approval by the king. The story is told by various items in the published journals of the two Houses, but before it can be properly outlined, it is necessary to say a word about the difference between the old style and the new style calendars. This is desirable also because at least one of the leading books on the Statute of Frauds misapplies the calendar in stating dates.

It was in March, 1582, that Pope Gregory XIII abolished the use of the old calendar, which had ceased to correspond accurately with the seasons or to indicate the days of the new moons, and substituted the one which we now have; but it was not until the year 1751 that the British were won over to the Gregorian Calendar, or new style, as it is called. In the latter year Lord Chesterfield, of polite and instructive memory, introduced into Parliament a bill which passed that year and which provided for the putting into effect of the new style beginning with the first of the following January. Under the new style the year began, as we are of course accustomed to have it begin, with January 1, while under the old style it began with March 25.⁴ As the old style was eleven days ahead of the new — in the eighteenth century the vernal equinox occurred on March 10, old style, but March 21, new style, — the act provided that in September, 1752, the day after September 2 should be called September 14.⁵ The change in calendars is apt to be somewhat misunderstood, just as the time of beginning of the new year under the old style in England is apt to be misstated. It is only the months of January and February and the first twenty-four days of March as to which it is ever necessary to change

⁴ The date is often misstated. The old year going out and the new year coming in can be seen in the journals of the two houses of Parliament for 29 Car. II. On Saturday, March 24, 1676 old style, each house adjourned to the following Monday. The next date is Monday, March 26, 1677. See 9 Journal of House of Commons, 405, 13 Journal of House of Lords, 85-86. So, in 31 Car. II, on Monday, March 24, 1678 old style, each house adjourned to the next day, which appears as March 25, 1679. See 9 Journal of the House of Commons, 575-576; 13 Journal of the House of Lords, 474-475.

⁵ Low & Pulling's Dictionary of English History, title "Calendar." It is interesting to note that the change in England from old style to new "met with a good deal of ignorant opposition. The common Opposition election cry was, 'give us back our eleven days.'" *Id.*

the year in expressing in new style the old style date. January, 1676, under the old style, is January, 1677, in the new, but April, 1676, or December, 1676, under the old style is the same under the new. Accordingly, when it is said in the old style that Sir Matthew Hale died on Christmas day, 1676, that means Christmas day, 1676, in the new style also.⁶ But when it is said that the session of Parliament following the prorogation in November, 1675, met on February 15, 1676 old style, it means that it met on February 15, 1677 new style.⁷

And now we are ready to trace the legislative history of the statute's passage. As stated above, in November, 1675, King Charles II prorogued Parliament to February 15, 1676 old style, *i. e.*, February 15, 1677 new style. On February 15, 1677, by the new style which from now on we shall use, Parliament convened, and two days later, on February 17, 1677, there is an entry of the first reading in the House of Lords of "An Act for Prevention of Frauds and Perjuries."⁸ Two days later, namely, on February 19, 1677, the second reading took place and the consideration of the bill was committed to thirty-seven temporal and ten spiritual lords named in the journal of the House of Lords. Following the list of names appeared the entry:

⁶ The statement in 1 Reed on the Statute of Frauds, ed. 1884, § 1, p. 2, that "The Statute of Frauds was passed in the session of Parliament beginning February 15, 1676, and Sir Matthew Hale had died the previous Christmas (December 25, 1676, O. S.)," is erroneous, for it is apparent that the "O. S.," to designate old style as distinguished from the new, should not appear where it does, but instead should appear after "February 15, 1676," or else that date should read February 15, 1677. It was put where it was, undoubtedly, because the author thought that the Statute of Frauds was passed in 1676 and yet was sure that Sir Matthew Hale died before its passage.

⁷ The Parliament which was sitting in the year of 29 Car. II began in 1661 just after the Restoration and, with various recesses and prorogations, lasted until dissolved in 1679. It did not sit in 1676, as we would date the year under the reformed calendar, for in the latter part of November, 1675, which date is the same under the old style and under the new style calendar, the king prorogued Parliament for a period of about fifteen months, namely, to February 15, 1676 old style, or February 15, 1677 new style. 4 Cobbett's Parliamentary History, 803. "The House of Commons elected after the Restoration first met on the 8th day of May, 1661. It continued to sit till the 25th of January, 1679. Vacancies had been filled up from time to time by new elections; and in these what was called the Country Party gradually predominated. But the general composition of the House was a curious admixture of by-gone and current opinions." 4 Knight's Popular History of England, 224.

⁸ 13 Journal of House of Lords, 43.

"Lord Chief Justice Common Pleas, "Justice Windham, "Justice Jones, and "Justice Scrogs,	}	to assist." ⁹
---	---	--------------------------

On March 6, 1677, the Earl of Dorset reported to the House of Lords "that the Committee for the Bill for preventing Frauds and Perjuries have met several Times; and are of Opinion, that the said Bill is fit to be engrossed with some Amendments." The amendments were then read twice and agreed to and the bill as amended was ordered engrossed.¹⁰ On March 7, 1677, the act passed the House of Lords and was sent to the House of Commons.¹¹ It was received by the latter house on the same day.¹²

On March 13, 1677, the bill was read the first time in the House of Commons.¹³ On April 2, 1677, it was read the second time.¹⁴ On April 12, 1677, it was reported from committee, with several amendments which were twice read, "and all, but the last Amendment (which was to make the Bill temporary) were upon the Question, agreed."¹⁵ The bill as amended was then read a third time and passed and sent to the House of Lords.¹⁶ It was received by the latter house on the same day, and the amendments made by the House of Commons were read twice and agreed to.¹⁷

The next and last entry is in the journal of the House of Lords on April 16, 1677.¹⁸ On that day the king came to the House of Lords and the Lords robed to meet him. The entry then reads:

"The House being resumed; and His Majesty sitting in His Royal Throne, adorned with His Regal Ornaments (the Peers being also in their Robes); the Gentleman Usher of the Black Rod was commanded to signify to the House of Commons His Majesty's Pleasure 'that they come up presently, and attend Him, with their Speaker.'

"Who being come; the Speaker (after a short speech) humbly presented His Majesty with Two Bills, which being received at the Bar by the Clerk of the Parliaments and brought to the Table, the Clerk of the Crown read the Titles of them. . . .

⁹ 13 Journal of House of Lords, 45. On the practice of having judges assist the House see Pike, *Constitutional History of the House of Lords*, 246-248.

¹⁰ 13 *id.* 62.

¹¹ 13 *id.* 63.

¹² 9 Journal of House of Commons, 394.

¹³ 9 *id.* 398.

¹⁴ 9 *id.* 410.

¹⁵ 9 *id.* 419.

¹⁶ 9 *id.* 419.

¹⁷ 13 Journal of the House of Lords, III.

¹⁸ 13 *id.* 120.

"To which Two Bills the Clerk of the Parliaments pronounced the Royal Assent, in these words,

"*Le Roy, remerciant Ses bons Subjects, accepte leur Benevolence, et ainsi le veult.*"

"In the same Manner other Public Bills were passed; as,

"1. — An Act for Prevention of Frauds and Perjuries," . . .

"8. — An Act for the better Observation of the Lord's day, commonly called Sunday."

"To these the Royal Assent was pronounced in these Words,

"*Le Roy le veult.*"

Thus, with pomp and ceremony, came into legal existence that Statute of Frauds which has been both so much praised and so much deplored; and its final passage and the royal assent to it must both be dated April 16, 1677.¹⁹

II. THE AUTHORSHIP OF THE STATUTE.

Down to the nineteenth century the framing of the Statute of Frauds was attributed mainly to Sir Matthew Hale, the model Chief Justice of the King's Bench, and to Sir Leoline Jenkins, an eminent authority on the canon law, though, as we have seen, Lord Mansfield in 1757 questioned the participation of Sir Matthew Hale, and though by some the honor of a leading part in the enactment of the statute was claimed for others, as for Sir Francis North (Lord Keeper Guilford). But in 1827 the previous tradition was shattered through the publication by Lord Eldon's reporter, Swanston, in the appendix to the third volume of his reports, at Lord Eldon's suggestion, of some manuscript opinions by Lord Nottingham discovered by Lord Eldon;²⁰ for among those was the opinion in *Ash v. Abdy* delivered in 1678, the year after the Statute

¹⁹ It can be seen that the conclusion of Mr. Browne in the Introduction to his treatise on the Statute of Frauds that the statute "was never regularly engrossed with a view to its enactment" finds no support in the journals of the Houses of Parliament. Whatever its faults, the statute was not hastily drafted nor carelessly considered legislation. "The difference of phraseology in the different sections of the original English statute [of frauds] . . . may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands." Peters, J., in *Bird v. Munroe*, 66 Me. 337, 344 (1877).

²⁰ See 2 Swanst. 83.

of Frauds was passed, in which, in holding that the Statute of Frauds was not retroactive and so did not apply to a bill filed after the statute to enforce specifically an oral contract entered into before the passage of the act, Lord Nottingham said:²¹

"I had some reason to know the meaning of this law; for it had its first rise from me, who brought in the bill into the Lord's House, though it afterwards received some additions and improvements from the Judges and the civilians."

As Sir Matthew Hale resigned his office on February 21, 1676, because of growing weakness in body, and from about that time till his death on Christmas day, 1676, "was in so poor a State of Health that there was no hopes of his Recovery,"²² as Sir Leoline Jenkins was absent from England from December, 1675, to August, 1679,²³ and as Lord Nottingham's opinion in *Ash v. Abdy* was delivered so soon after the passage of the Statute of Frauds that its general truthfulness could not be questioned, it was but natural that, after the publication of that opinion, even those who believed that the Statute of Frauds was passed in 1676 should have found it difficult to contend that either Sir Matthew Hale or Sir Leoline Jenkins had much to do with the drafting of the statute or to deny that Lord Nottingham had the originating part in its production. Indeed, Lord Nottingham was accepted at once as the author of the statute. In Campbell's "Lives of the Lord Chancellors of England" it is said:

"It is now ascertained that Lord Nottingham was the author of the most important and most beneficial piece of juridical legislation of which we can boast — the famous 'Statute of Frauds,' the glory of which was long divided between Lord Hale and Sir Leoline Jenkins."

In a note Lord Campbell added:

"Lord Hale and Leoline Jenkins may have been two of the Judges and civilians who assisted in improving it. See *Gilb. Rep. in Eq.* 171, 1 *North's Life of Guilford*, 209, 1 *Burr.* 418, 5 *East* 17. If Lord Notting-

²¹ *Ash v. Abdy*, 3 *Swanst.* 664 (June 13, 1678).

²² *Burnett's Life and Death of Sir Matthew Hale*, ed. 1682, 65.

²³ He reached Nimeguen on his peace embassy on January 6, 1675. 1 *Wynne's Life of Sir Leoline Jenkins* (1724), p. xxvi. He seems not to have returned to England until August, 1679. *Id.* p. xl.

ham drew it he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed." ²⁴

But too much has been left to conjecture and too little attention has been paid to what is contained in the accessible records. In the published journals of the two Houses of Parliament is material that clears away most of the difficulties. We must go to those journals for the rest of the truth which was only partially disclosed in the discussion regarding the date of the statute. We there traced the history of the Statute of Frauds from its first reading in the House of Lords on February 17, 1677, through its amendment there and in the House of Commons, until its final passage and the royal assent to it on April 16, 1677; but we did not note, what others dealing with the statute seem to have overlooked, that the bill was in Parliament several times before.

The first introduction of the bill seems to have been on February 16, 1673 old style, February 16, 1674 new style, for there is noted in the journal of the House of Lords of that date the first reading of "An Act for preventing many Fraudulent Practices, which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury." ²⁵ One who reads that title can hardly doubt that the bill was the original bill which after some vicissitudes, including a re-introduction in 1675 and some amendments, was finally re-introduced on February 17, 1677, and became law as the Statute of Frauds. On February 20, 1673 old style, February 20, 1674 new style, the bill was read a second time and its consideration committed to forty-four temporal lords and eleven spiritual lords. ²⁶ It then seems to have been smothered in committee.

Again, on April 14, 1675, there is noted in the journal of the House of Lords the first reading of "An Act for Prevention of Frauds and Perjuries." ²⁷ On April 15, 1675, occurred the second reading of the bill and the commitment of its consideration to thirty-five temporal and eight spiritual lords. ²⁸ On May 10, 1675, the Earl of Ailesbury ²⁹ reported

²⁴ 4 Campbell's Lives of the Lord Chancellors of England, 4 Eng. ed., 271.

²⁵ 12 Journal of the House of Lords, 638.

²⁶ 12 *id.* 645.

²⁷ 12 *id.* 656.

²⁸ 12 *id.* 659.

²⁹ Elsewhere in the Journal sometimes spelled Aylesbury.

"That the Committee appointed to consider the Bill for Prevention of Frauds and Perjuries have met several Times; and have, *upon the advice of the Judges*,³⁰ made several Amendments therein; which are offered to the Consideration of the House."³¹

The amendments were then read twice and agreed to and the bill as amended ordered engrossed.³² Then on May 12, 1675, the bill was read a third time and passed and sent to the House of Commons.³³ It reached the House of Commons on the same day.³⁴

On May 26, 1675, the bill was read the first time in the House of Commons and ordered to be read a second time,³⁵ but apparently was not read again in the House of Commons. The next appearance of a Statute of Frauds' bill in the House of Commons was when the third and last one was sent to that house by the Lords in March, 1677, and on that appearance, as we have seen, it passed with amendments.

In reference to the two appearances of the Statute of Frauds before that final introduction of it which ended in its passage, two things should be noted, namely, (1) that the Earl of Shaftesbury was on the first two committees of the House of Lords named to consider the bill,³⁶ and (2) that the presiding officer of the House of Lords on each occasion was Sir Heneage Finch, who on November 9, 1673, was made Lord Keeper, on December 19, 1675, became Lord High Chancellor, and on May 12, 1681, was given the title of Earl of Nottingham.

It should be remembered that the Earl of Shaftesbury had been Lord High Chancellor from November 17, 1672, to November 9, 1673, having succeeded Lord Keeper Orlando Bridgman as the custodian of the Great Seal. Lord Keeper Bridgman, whose fame as a learned conveyancer has been lasting, was removed from office through political intrigue to make way for Shaftesbury, and was still alive when the first bill for the statute intended to prevent frauds and perjuries was smothered in committee. That the Earl of Shaftesbury, who ceased to be Lord High Chancellor only a little over three months before that first bill was referred to the committee on which he was named, gave the bill such attention as his

³⁰ The italics are mine.

³¹ 12 Journal of the House of Lords, 686.

³² 12 *id.* 686.

³³ 12 *id.* 689.

³⁴ 9 Journal of the House of Commons, 335.

³⁵ 9 *id.* 345.

³⁶ 12 Journal of the House of Lords, 645, 659.

total lack of practice at the bar, his meagre judicial experience, and his active political interests permitted cannot be doubted. During the consideration of the amendments suggested by the judges to the committee that considered the second bill, the Earl of Shaftesbury must have been present. The importance of the measure makes that conclusion irresistible.³⁷

The record evidence that the Earl of Shaftesbury had some part in the committee consideration of the Statute of Frauds raises at once the question whether his predecessor, Lord Keeper Bridgman, was not also consulted about the statute. Sir Orlando Bridgman did not die until June 25, 1674, while the first bill was introduced in the House of Lords on February 16, 1674, so he could have had a hand in its original drafting and after that bill was killed in committee could have suggested changes to be made before its next

³⁷ The reason why ex-Chancellor Shaftesbury was not on the third and last committee of the House of Lords to consider the Statute of Frauds was that he was at the time of its appointment imprisoned in the Tower for contempt of the House of Lords in insisting, while supporting a motion of the Duke of Buckingham made February 15, 1677, that under certain statutes of Edward III the prorogation of Parliament for over fourteen months, namely, from November, 1675, to February, 1677, worked a dissolution of Parliament and in refusing to beg pardon for doing so. The Duke of Buckingham, Lord Wharton, the Earl of Salisbury, and the Earl of Shaftesbury were all committed to the Tower for this offense under an order of the House made February 15, 1677, two days before the third and last draft of the Statute of Frauds was read for the first time in the house. The Earl of Shaftesbury still further offended the House of Lords by applying on June 23, 1677, to the Court of King's Bench for a writ of *habeas corpus*. That court held that it had no power to interfere with the discipline by the House of Lords of its own members and Shaftesbury was sent back to the Tower. In consequence of his *habeas corpus* proceedings he was kept in prison longer than were the others punished with him. He was not released until late in February, 1678; and then only on making submission to the House of Lords in these words: "I do acknowledge that my endeavoring to maintain that the Parliament is dissolved was an ill advised action, for which I humbly beg the pardon of the King's Majesty and of this most honorable House; and I do also acknowledge that my bringing of a *habeas corpus* in the King's Bench during this session was a high violation of your Lordships' privileges and a great aggravation of my former offense, for which I likewise most humbly beg pardon of this most Honorable House." 2 Christie's Life of the First Earl of Shaftesbury, 259. On February 27, 1678, his name appears once more in the journal of the House of Lords in the list of Peers recorded as present. 13 Journal of the House of Lords, 163. The order of February 15, 1677, committing Shaftesbury and the others to the Tower, and all subsequent proceedings in their matter, were on November 13, 1680, declared by the House of Lords unparliamentary and ordered vacated. 13 Journal of the House of Lords, 684. Accordingly, in the published journal of the house only asterisks are to be found where those proceedings would otherwise appear.

introduction. In view of his exceptional skill as a conveyancer and his great learning, it is difficult to believe that he was not consulted, at least by letter, about the real property and the trust sections of the statute, even though it be true that "After his fall [from the Lord Keepership in November, 1672] he lived in entire seclusion at his villa at Teddington" until his death.³⁸

But the significant thing is the way the records bear out Lord Nottingham's statement in the case of *Ash v. Abdy*. He says that the statute "had its first rise from me, who brought in the bill into the Lord's House." He was Lord Keeper when the first and second bills were introduced in the House of Lords and he was Lord High Chancellor when the third and last bill was introduced and passed. As presiding officer of the House of Lords during all that time his opportunity to do what he said he did was ample. It cannot be doubted that he introduced the bill. Then consider his further statement that while he brought in the bill "it afterwards received some additions and improvements from the Judges and civilians." We know from the report of the committee of the House of Lords noted in the journal of that house for May 10, 1675, that "upon the advice of the Judges," whoever they may have been, certain amendments were adopted, and we know also that the third and final bill was amended both in the House of Lords, where certain judges had been named to assist the committee, and in the House of Commons.

But while we do not know exactly who the judges were who recommended changes in the bill in 1675, we need no longer doubt that Sir Matthew Hale was one. He was alive and in a state of health to be consulted, — he did not retire for ill health until 1676, — and as he could be consulted, the statement in North's life of Lord Keeper Guilford that Lord Chief Justice Hale "had the Pre-eminence and was chief in fixing that law [the Statute of Frauds]"³⁹

³⁸ 4 Campbell's Lives of the Chancellors, 4 Eng. ed., 152.

³⁹ "He [Sir Francis North] had a great Hand in the Statute of Frauds and Perjuries of which the Lord Nottingham said that every Line was worth a subsidy. But, at that Time, the Lord Chief Justice Hales had the Pre-eminence and was chief in the fixing that Law: Although the urging Part lay upon him [Sir Francis North] and I have reason to think that it [the Statute of Frauds] had its first Spring from his Lordship's [Sir Francis North's] Motion. For I find in some Notes of his and Hints of Amendments in the Law, every one of those Points which were there taken Care of." Roger North's Life of Francis North, Baron of Guilford, ed. 1742, 109.

must be taken as sufficient evidence that at least he had a large part in shaping the statute. The statement is entitled to all the more weight because, as we have seen, the committee appointed to consider the third and last bill in the House of Lords had assigned to assist it, not only Justices Windham, Jones, and Scrogs, but also the Lord Chief Justice of the Common Pleas. Sir Francis North, who had become Chief Justice of the Common Pleas on January 23, 1675, and who in the course of his services rendered to the committee must have become acquainted with the contributions to the statute made by different judges, may fairly be counted on to have told what he found out to the brother who wrote his *Life* and who in it gave Sir Matthew Hale the credit for the statute. That Sir Matthew Hale made real contributions to the Statute of Frauds cannot fairly be doubted.

It seems just as certain that Sir Leoline Jenkins also contributed to it. Lord Nottingham's statement attributes amendments to the judges "and the civilians." Of course the civilians had a hand — the lords spiritual on the several committees would see to that with reference to any bill containing comprehensive will and land provisions. Sir Leoline Jenkins did not leave England for those years of absence which we have mentioned till December, 1675, and he had practically the same opportunity to be consulted and to propose amendments that Sir Matthew Hale had. Whether he contributed only the little that his biographer Wynne claims,⁴⁰ or actually did more, it seems clear that he contributed something.

Now a word about the Justices Windham, Jones, and Scrogs named to assist the committee of lords appointed to consider the last bill.

Justice Windham was the Hugh Wyndham or Hugh Windham who on June 20, 1670, was made Baron of the Exchequer, and who on January 22, 1673, was removed to the Common Pleas. Foss says of him, "In neither court did he particularly distinguish himself."⁴¹

Justice Jones was the Thomas Jones who was made a judge of

⁴⁰ "He [Sir Leoline Jenkins] had likewise some hand in preparing the Statute of Frauds and Perjuries; especially that Proviso in it, which excepts the Wills of Soldiers and Seamen from the strict Formalities required in the Wills of other Persons, leaving them to the full privilege of the old Roman Military Testament." 1 Wynne's *Life of Sir Leoline Jenkins* (1724), p. liii.

⁴¹ Foss, *Biographical Dictionary of the Judges of England*, 774.

the King's Bench on April 13, 1676, and on September 29, 1683, succeeded as Chief Justice of the Common Pleas Sir Francis North, appointed Lord Keeper on December 20, 1682. On April 21, 1686, Chief Justice Jones was dismissed from office for a remark of his made to King James when the latter said that he wanted twelve judges, Jones among them, to declare in favor of the king's dispensing power, *i. e.*, the power to relieve individuals or classes of persons from the necessity of complying with the religious Test Act passed by Parliament. Chief Justice Jones's remark was that "possibly his Majesty might find twelve *judges* of his opinion, but scarcely twelve *lawyers*,"⁴² since the king had no power to dispense with a statute which Parliament had enacted for the preservation of the established religion of the country.

Justice Scroggs was the William Scroggs who was made a justice of the Common Pleas on October 23, 1676. On May 31, 1678, he became Chief Justice of the King's Bench, from which position he was removed on February 16, 1680. Lord Campbell says of him that "Scroggs had excellent natural abilities, and might have made a great figure in his profession; but was profligate in his habit, brutal in his manners, with only one rule to guide him — a regard to what he considered his own interest — without a touch of humanity, wholly impenetrable to remorse."⁴³

It has been shown then by official records that the Statute of Frauds was finally passed and received the royal assent on April 16, 1677; that Lord Nottingham, who announced within fourteen months after the passage of the statute that the statute "had its first rise from" him, was the presiding officer of the House of Lords during the whole time that the successive bills of 1674, 1675, and 1677 were before Parliament; that the Earl of Shaftesbury, ex-Lord Chancellor, was a member of the committees appointed in the House of Lords to consider the first two bills; that on May 10, 1675, "upon the advice of the judges," the second bill was amended in the House of Lords, on March 6, 1677, the third and last bill was amended in the House of Lords, and on April 12, 1677, the third bill was amended in the House of Commons (Lord Nottingham's statement that the statute "received some additions and improvements from the judges and the civilians" being thus veri-

⁴² Foss, *Biographical Dictionary of the Judges of England*, 378.

⁴³ 2 Campbell's *Lives of the Chief Justices of England*, ed. Boston, 1873, 254.

fied); and that Justice Hugh Wyndham of the Common Pleas, Justice Thomas Jones of the King's Bench, Justice William Scroggs of the Common Pleas, and Sir Francis North, Chief Justice of the Common Pleas, were assigned by the House of Lords on February 19, 1677, to assist the committee of the house to which was entrusted the consideration of the third and last bill. It has also been demonstrated that before the first bill was smothered in committee Sir Orlando Bridgman, ex-Lord Chancellor, who as the foremost conveyancer of his day would naturally have been asked to criticize those provisions of the statute affecting conveyancing, could have been consulted in person by the Lord Keeper, father of the statute; that while the first two bills for the statute were before Parliament Sir Leoline Jenkins, whose learning in the civil law would naturally have been requisitioned by the lords spiritual on the various committees appointed to consider the bill, could have been consulted in person as to the drafting and amendment of those first two bills; and that while the first two bills were before Parliament Sir Matthew Hale, the great Chief Justice of the King's Bench, whose learning and political influence were such as to make it imperative that his approval of the proposed statute be obtained, could have been consulted in person and could have been one of "the Judges" upon whose recommendation amendments to the second bill were voted in the House of Lords on May 10, 1675. That Sir Leoline Jenkins, Sir Francis North (later Lord Keeper Guilford), Sir Matthew Hale, and Lord Nottingham, as well as many lesser legal lights, had a hand in making the statute, cannot be doubted.

The proper division of the glory of authorship of the statute, if indeed it be glory,⁴⁴ may be left to others, but in conclusion it may

⁴⁴ In a book of lectures on contracts by the learned editor of Smith's Leading Cases it is said: "The great Lord Nottingham used to say of it '*that every line was worth a subsidy*,' and it might now be said with truth that every line has *cost* a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line and almost every word of it has been the subject of anxious discussion resulting from the circumstances that the matters which its provisions regulate are those which are of every day occurrences in the course of our transactions with one another." Smith, *Contracts*, 6 Am. ed., *70-71. In 1 Throop on *Verbal Agreements*, ed. 1870, 72, note, a subsidy is estimated at about £50,000.

"It was said at Westminster Hall, more than seventy years ago, that the Statute of Frauds had not been *explained* at a less expense than one hundred thousand pounds sterling; and Chancellor Kent, at the time he wrote his *Commentaries*,

be well to point out the significance of the fact that various Lord Keepers and Lord Chancellors played a part in the statute's enactment. Professor James Bradley Thayer's surmise that the provisions about contracts and about wills were intended by the statute's authors and enactors primarily to keep certain cases away from juries⁴⁵ must be considered in connection with that fact, for the two things serve to explain chancery's attitude toward the Statute of Frauds. It can hardly be doubted that when Lord Chancellor Jeffreys, who succeeded Lord Keeper Guilford, decided *Butcher v. Stapely*,⁴⁶ — one of the earliest cases in which the chancery court gave specific performance of a partly performed contract which could not be recovered upon at law because of the lack of the written evidence required by the Statute of Frauds, — the reason why he held that the statute did not apply was because its framers never intended that it should.⁴⁷ If it be true

thought the sum might then be put down at a million and upwards. 2 Kent's Comm. 513, note. These are both very safe estimates, and still the statute is not yet 'explained.'” Bronson, J., in *Downs v. Ross*, 23 Wend. (N. Y.) 270, 272 (1840).

⁴⁵ “The older law and the older decisions relating to them were often mainly concerned in keeping matters out of the hands of juries. This motive appears in the language of the Statute of Fines . . . and it seems to have had its place in bringing into existence the English Statute of Frauds.” Thayer's Preliminary Treatise on Evidence, 409-410. “It is not probable that so wide reaching an act could have been passed if jury trial had been on the footing which it holds today.” *Id.* 430.

⁴⁶ 1 Vern. 364 (1686).

⁴⁷ The House of Lords' decision in *Lester v. Foxcroft*, Colles' Cases in Parliament, 108 (April 7, 1701), confirms this conclusion. It must be admitted that this view would be much more likely to receive universal assent if Sir Francis North, as Lord Keeper Guilford, had rendered the decision in *Butcher v. Stapely*, 1 Vern. 364. While the decision has been credited to Lord Guilford by Lord Chancellor Selborne in *Maddison v. Alderson*, 8 App. Cas. 467, 477 (1883), and, recently, by Mr. Jenks (*A Short History of English Law*, 217, note), that credit was doubtless given through a confusion of the calendars. Jeffreys was appointed Lord Chancellor on September 28, 1685, and *Butcher v. Stapely* appears in 1 Vernon as decided February 10, 1685. But the report shows that the opinion was by “The Lord Chancellor,” and preceding the case in 1 Vernon are cases dated after March 25, 1685, so it is evident that the date of February 10, 1685, assigned to the case is February 10, 1685 old style, or February 10, 1686 new style, and that Lord Chancellor Jeffreys decided it. While Lord Guilford gave unsatisfactory opinions in *Hollis v. Whiteing*, 1 Vern. 151 (March 2, 1683 new style), and in *Hollis v. Edwards*, 1 Vern. 159 (May 1, 1683), his opinion in *Hollis v. Whiteing* showed that he recognized the right of equity to give relief in some cases even if the Statute of Frauds was not complied with. The full report of the case is as follows:

“The bill was to have the execution of a parol agreement for a lease of a

that "equity, even before the Statute of Frauds, would not execute a mere parol agreement not in part performed,"⁴⁸ and that the part-performance served because the possession given the vendee which was essential to the part-performance was the equivalent of livery of seisin,⁴⁹ then the statute's framers were thoroughly familiar with the part-performance problem, and the decisions which shortly after the passage of the Statute of Frauds settled the law that part-performance would make the oral contract for the sale of land enforceable in chancery, notwithstanding the statute, are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in the part-performance cases. The judges who framed the Statute of Frauds were so anxious to tie the hands of juries and so possessed by the idea that the statute would not apply *ex proprio vigore* to chancery cases that they neg-

house, setting forth that in confidence of this agreement the plaintiff had laid out and expended very considerable sums of money, etc.

"The defendant pleaded the statute of Frauds and Perjuries, and the plea was allowed. *But the Lord Keeper was of the opinion, that if the plaintiff had laid in his bill that it was part of the agreement that the agreement should be put into writing, it would alter the case, and possibly require an answer.*" The italics do not appear in the report.

Lord Guilford, therefore, recognized that equity could give relief in some instances where the statute was not complied with, but did not properly define those instances. See Browne, Statute of Frauds, 5 ed., § 446. While Lord Guilford would be worth citing on the subject of the authorship of the statute, the House of Lords' decision in *Lester v. Foxcroft*, *supra*, is more satisfactory evidence of the intent of the framers of the statute than are Lord Guilford's decisions. When *Lester v. Foxcroft* was decided there were doubtless in the House of Lords some peers who assisted in the framing and passage of the Statute of Frauds. That was a time when all members of the House of Lords who cared to do so participated in deciding cases taken on error or on appeal to the House; when the suits were decided there by a majority vote of the Lords (see Hale, Jurisdiction of the Lords House of Parliament, Hargrave, ed. 1796, 155); and when it was still true that though they took the advice of judges as to the causes, "The Lords exercised the mixed functions of jurymen and judges, and, as in judgments on impeachment, might be influenced by private or party considerations, debating and dividing on the question before the House." W. F. Craies on Appeal in 2 Ency. Britt., 11 ed., 214. See Hale, Jurisdiction of the Lords House of Parliament, Hargrave, ed. 1796, 155-159. Lord Chancellor Jeffreys' decision in *Butcher v. Stapely* in 1686, and the House of Lords' decision in *Lester v. Foxcroft* in 1701, are sufficiently near to the passage of the Statute of Frauds for them to be taken as representative of the intent of the statute's framers.

⁴⁸ Sugden on Vendors and Purchasers of Estates, 14 ed., 152.

⁴⁹ See *Miller v. Lorentz*, 39 W. Va. 160 (1894); *Poorman v. Kilgore*, 26 Pa. St. 365 (1855).

lected to be as explicit in the wording of the statute as they should have been. But as the intent of the judges who inspired and worded the statute was the intent of Parliament, since Parliament simply enacted what they recommended, and as the judges proceeded to make the proper exceptions to the application of the statute in chancery, no harm was done. The chancery judges very sensibly accepted the statute as the rule for chancery as well as law, except where part performance or other happenings would make the application of the statute in the given case against conscience.⁵⁰

The demonstrated authorship of the Statute of Frauds makes it clear, therefore, that the chancery judges did not intentionally legislate judicially out of the Statute of Frauds any matters which they understood Parliament to have meant it to cover. A remark of Lord Campbell, already quoted in this article, explains quite simply, though of course unintentionally, the innocence of legislative intent of the chancery judges in the part-performance cases; for that remark, though directed at Lord Nottingham, would equally apply to any other judge who actively participated in the statute's framing or was influenced in his views of the statute by those who did so participate. The remark may well be repeated, not because as a whole it can be approved, but because it contains the psychology which seems to be needed for the full understanding of chancery's attitude toward the Statute of Frauds:

"If Lord Nottingham drew it [the Statute of Frauds], he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed."

It would, however, seem truer to say that, whatever may be the case as to the authors of other statutes,⁵¹ it was just because the authors of the Statute of Frauds, who were also called upon to construe it, considered what they privately intended as well as the

⁵⁰ "Generally speaking, though professing themselves not to be strictly bound by the words of the Statute of Frauds, equitable tribunals refused to enforce contracts for which the statutory evidence of writing required by that statute was not forthcoming. But if the defendant had fraudulently prevented the proper evidence being used, or had admitted in his pleadings the terms of the contract, or, if in reliance on the contract the plaintiff had incurred loss or liability in part performance of it, then a court of equity would decree specific performance; even though no action lay at law." Jenks, *Short History of English Law*, 217.

⁵¹ See Maxwell on the Interpretation of Statutes, 5 ed., 42-47; Black, *Construction and Interpretation of the Laws*, 312-315.

meaning which they expressed that they and their successors who accepted their point of view proved so well qualified to interpret that statute.⁵²

George P. Costigan, Jr.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

⁵² In Sedgwick on the Interpretation and Construction of Statutory and Constitutional Law, 2 ed., 205, it is said: "It may very well be that in the condition of English jurisprudence in former times, when laws were few and rarely passed, when the business of legislation was confined to a small and select class to which practically the judiciary belonged, when the legislative and judicial bodies sat in the same place, and, indeed, in the same building, — in such a state of things, it may well be that the judiciary might suppose themselves to possess, that they might indeed really possess, a considerable personal knowledge of the legislative intent, and that they might come almost to consider themselves as a co-ordinate body with the legislature."

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President.*
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer.*
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,
FRANCIS S. WYNER.

INJUNCTIONS TO RESTRAIN SUITS IN A FOREIGN JURISDICTION. — The jurisdiction of a sovereign to enjoin persons within his dominions from taking part in judicial proceedings abroad follows from his power to give commands to all persons within his realm. It would, indeed, be undesirable to give commands obedience to which he could not insure, such as an order to do affirmative acts abroad. But in the case of negative decrees there would seem to be no such objection. This jurisdiction to render decrees has been delegated by sovereigns in common-law countries to courts of equity in cases where such a decree is necessary to protect the equitable rights of others. Therefore where the foreign suit can fairly be regarded as an infringement upon such a right the jurisdiction of equity to enjoin it is scarcely disputable.¹

Nevertheless, the question of when a person has an equitable right to be sued in one state rather than another is often one of considerable difficulty, since it involves a consideration of the respect due to foreign tribunals and the necessity of refraining from interference with proceedings before them except for good cause.² Thus it is generally recognized

¹ *Portarlington v. Soulby*, 3 Myl. & K. 104; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Vermont & C. R. Co. v. Vermont Central R. Co.*, 46 Vt. 792. *Contra*, *Lowe v. Baker*, *Freem.* 125. Realizing that the presence of a person within the state gives the state jurisdiction over him, some courts are inclined to pay scant heed to the question whether the objections to suit abroad are strong enough to entitle the plaintiff to an injunction on ordinary equitable principles. *Cf. Snook v. Snetzer*, 25 Oh. St. 516; 5 LL. L. REV. 1.

² Such interference is not, however, a violation of the "due faith and credit" or the "privileges and immunities" clauses of the federal Constitution. *U. S. CONST. Art. 4, §§ 1, 2; Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269.

that a suit in a foreign court ought not to be enjoined on any theory that the court of the forum has a better understanding of the principles of justice than its neighbor.³ Nor would the fact that the suit involves a knowledge of the local law as to which the domestic court has superior information seem a sufficient ground for an injunction.⁴ So, too, the fact that the foreign procedure is more favorable to the party suing there than that of the forum is generally immaterial.⁵ If, however, the domestic procedure is not merely a method of conducting trials, but involves a local policy such as the protection of a certain class in the community, it is generally held inequitable for one citizen of that community to seek to deprive another of the advantages of this law by suing him abroad.⁶ On this ground the evasion of exemption laws by foreign attachment on the part of a domestic creditor is generally enjoined.⁷ So too, where a court is attempting to distribute the assets of a bankrupt ratably by receivership or insolvency proceedings, a domestic creditor will be restrained from securing a preference by a foreign suit.⁸

In cases where a suit at law within the jurisdiction would be enjoined, the same reasons will generally justify enjoining an action in a foreign state.⁹ Thus a vexatious multiplicity of suits in the same jurisdiction will be enjoined.¹⁰ And the same principle applies to simultaneous suits in separate jurisdictions.¹¹ Nevertheless it is now held in England that such suits are *primâ facie* not vexatious, since the plaintiff is entitled to any procedural advantage which he may thus obtain.¹² It would

³ *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312; *Bigelow v. Old Dominion Copper, etc. Co.*, 74 N. J. Eq. 457, 71 Atl. 153. Even though, as between the parties, a plaintiff is entitled to equitable relief, the court, on grounds of public policy, may refuse to grant an injunction. Therefore, although the court believes that the defendant will not obtain justice from the foreign tribunal, the necessity for harmony between courts and the principles of comity should make it very slow to grant an injunction, especially since the other court may retort with an injunction and thus make any settlement of the litigation impossible. See *Peck v. Jenness*, 7 How. (U. S.) 612, 625.

⁴ *Hyman v. Helm*, 24 Ch. D. 531; *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178. But cf. *Bushby v. Munday*, 5 Madd. 297. It is sometimes said that suit abroad is an evasion of the local law. *Dinsmore v. Neresheimer*, 32 Hun (N. Y.) 204. Where the issue is one of substantive law this charge is unfounded, since any court will presumably apply the law which created the right and not that of the forum.

⁵ *Thorndike v. Thorndike*, 142 Ill. 450, 32 N. E. 510; *Edgell v. Clarke*, 19 N. Y. App. Div. 199, 45 N. Y. Supp. 979.

⁶ See *Bigelow v. Old Dominion Copper, etc. Co.*, 74 N. J. Eq. 457, 481, 71 Atl. 153, 163. So a citizen of Maryland was enjoined from suing another citizen in New York and arresting him for debt which was opposed to Maryland policy. *Miller v. Gittings*, 85 Md. 601, 37 Atl. 372. The wisdom and justice of the attempt to make the local policy binding on the citizens of a state both at home and abroad in such a case as this may be questioned. See 5 ILL. L. REV. 1, 15.

⁷ *Snook v. Snetzer*, *supra*; *Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616. Since the validity of foreign attachments of choses in action is scarcely defensible on principle, a state would seem justified in adopting every legal means of interfering with them. Cf. *Renier v. Hurlbut*, 81 Wis. 24, 50 N. W. 783. But cf. *Chicago, R. I. & P. Ry. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797.

⁸ *Dehon v. Foster*, *supra*; *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 666.

⁹ *Portarlington v. Soulby*, *supra*. See *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. *416, *439.

¹⁰ *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8; *Third Ave. R. Co. v. Mayor*, etc. of New York, 54 N. Y. 159.

¹¹ See *Wedderburn v. Wedderburn*, 4 Myl. & C. 585, 596; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. *416, *437.

¹² *McHenry v. Lewis*, 22 Ch. D. 397; *Hyman v. Helm*, 24 Ch. D. 531.

seem, however, that no injustice would be done by compelling him to elect between the two suits, since this would enable him to try his case in the most advantageous forum, and, if successful there, to levy on the property in the other state by suing on his judgment.¹³ Such a rule would spare the defendant much needless expense. The American authorities hold, however, that the question involves not merely the rights of the parties but the right of the court which first gets jurisdiction of a question to retain it. On this ground the second suit is generally enjoined by the court in which the action is first brought.¹⁴ A recent case would seem to be correct on either theory in dissolving a preliminary injunction against a second suit abroad after the domestic suit had been discontinued, since the prior jurisdiction of the local court had thus come to an end, and no serious harassing of the other party was involved.¹⁵ *Jones v. Hughes*, 137 N. W. 1023 (Ia.).

THE RELATION OF ESTOPPEL TO AFFIRMATIVE DUTIES IN THE LAW OF TORTS. — That there is no affirmative duty to act has long been one of the axioms of the law of torts. An act may have been attended with many legal consequences, but none were attached to a mere failure to act. Omission was an act in legal fiction only when some duty had been voluntarily assumed.¹ There is a tendency in the law, however, to impose a liability in certain cases for a mere failure to act although arising from no relation thus assumed. The owner of land may be estopped to assert his title² or to sue for a trespass³ if he fails to warn a stranger who is innocently dealing with the land as the property of another. A cor-

¹³ *White v. Caxton Book-binding Co.*, 10 Civ. Proc. (N. Y.) 146. *Contra*, *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. D. 225.

¹⁴ *Fisk v. Union Pacific R. Co.*, 10 Blatchf. (U. S.) 518; *French, Trustee, v. Hay*, 22 Wall. (U. S.) 250; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238. This rule that the court which first gets possession of the controversy shall retain it is well calculated to prevent coördinate courts from interfering with each other. Although it is perhaps a question of the relation between the courts, rather than between the parties, a court is probably justified in saying that no one over whom it has jurisdiction shall take part in abrogating this rule.

¹⁵ In the principal case the foreign action was brought in an adjoining state. Even where the action is instituted at a place much more distant from the defendant's domicile, this fact alone is not generally regarded as a sufficient ground for an injunction. *Fletcher v. Rodgers*, 27 Wkly. R. 97; *Edgell v. Clarke*, *supra*.

¹ See *Eckert v. Long Island Ry. Co.*, 43 N. Y. 502, 505, 508; 1 BEVEN, NEGLIGENCE, 3 ed., 157, note 4; HOLMES, COMMON LAW, 82, 152, 161; 8 HARV. L. REV. 386.

² *Coram v. Palmer*, 58 So. 721 (Fla.); *Baillarge v. Clark*, 145 Cal. 589, 79 Pac. 268. See 18 HARV. L. REV. 622. It is submitted that silence, unconnected with previous conduct, can never be a real representation. It seems doubtful if mere presence within hearing of a sale is such previous conduct as to amount to a representation that the sale is valid. Certainly mere absence from a sale coupled with knowledge of the transaction is not a representation, that the sale is valid, to a purchaser who does not know of the real owner's existence, yet here too the courts raise an estoppel. *Anderson v. Hubble*, 93 Ind. 570. If the law chooses to treat such silence as a representation it is making omission an act, — *i. e.*, the law under certain circumstances imposes a duty to speak.

³ *Marvin v. Tusch*, 98 N. E. 860 (Oh.); *Adair v. Curry*, 106 Mo. App. 578, 80 S. W. 967. *Contra*, *Lewis v. Patton*, 42 Mont. 528, 113 Pac. 745.

poration may be estopped to deny the validity of a contract or conveyance made in its name by a person without authority if its directors or stockholders fail to repudiate it promptly after knowledge.⁴ A debtor is liable to the assignee of the debt if he pays the creditor after notice of the assignment.⁵ The apparent maker of a forged note may be estopped to deny his signature if, on learning of the deception, he does not at once notify the payee of the forgery.⁶ A recent case recognized a similar duty of repudiation as to a forged telegram, although it found absence of reliance on the defendant's disingenuous replies sufficient to prevent an estoppel. *Wiggin v. Browning*, 23 Ont. Wkly. Rep. 128 (Divisional Ct.).

It seems impossible to explain these cases except by the imposition of an affirmative duty without any voluntary assumption. By the fraud or negligence of entire strangers, one whose past conduct has been unimpeachable is suddenly required to act or be subjected to legal liability. The law seems ready to adopt another modicum of morality, and it is not difficult to admit the justice of the extension. Theoretically it seems impossible to distinguish the imposition of a duty to rescue a drowning child from the imposition of one to warn a defrauded payee. The reliance by the payee on the purported maker is the only distinguishing element, and that fails since the payee has no right to rely on his silence unless there is a duty to speak. There is, however, the practical difference that the rescue is usually attended with considerable peril⁷ or expense, while the warning is generally a matter of little difficulty. And it is doubtful if the law would impose the duty to warn if, in any instance, it were a real burden.⁸

The ordinary remedy for the violation of this affirmative duty has been procured by means of an estoppel.⁹ If there is any "material loss" as a consequence of the wrongful silence, there is said to be an estoppel to deny the validity of the entire transaction. The courts properly feel a difficulty in estopping the purported maker as to one-half the note and yet allowing him a denial as to the remainder.¹⁰ The damage for which a

⁴ *Alexander v. Culbertson Irrigation & Waterpower Co.*, 61 Neb. 333, 85 N. W. 283; *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682; *Sherman v. Fitch*, 98 Mass. 59. *Contra*, *Oliver v. Rahway Ice Co.*, 64 N. J. Eq. 596, 54 Atl. 460. The facts of these cases will not permit their decisions to be explained by an estoppel to deny the agent's apparent authority.

⁵ *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586; *Bradley & Currier Co., Limited, v. Berns*, 51 N. J. Eq. 437, 26 Atl. 908. Here the duty of not paying the creditor is imposed although the debtor has never consented to the assignment. It seems specious to say that he assented to an assignment when he contracted the debt, since the legal result can only be accomplished by the fiction of agency.

⁶ *Dominion Bank v. Ewing*, 35 Can. Sup. Ct. 133; *Urquhart v. Bank of Scotland*, 9 Scot. L. Rep. 508. A clear recognition of the novelty and fundamental nature of this doctrine has led some courts to deny flatly the existence of any duty to answer notices of forged notes. *British Linen Co. v. Cowan* (1906) 8 F. (Scot. Sess. Cas.) 704. The result in this whole class of cases is sometimes claimed to be merely an instance of sleeping on one's rights. Without inquiring into the application of that equitable doctrine to legal rights, the case of a forged note will not suffer that explanation since no right will ever be asserted by the person estopped.

⁷ A typical case is the rescue of a child from an approaching train. *Eckert v. Long Island Ry. Co.*, *supra*.

⁸ In *Dominion Bank v. Ewing*, *supra*, the court required a telegram rather than a letter, but even this seems doubtful. See 18 HARV. L. REV. 140, 148; 22 *id.* 112, 113.

⁹ See cases *supra*.

¹⁰ The injustice of the other result, however, has led some courts to disregard this

defendant may thus be required to pay may be much more than what he actually caused. If the result is unjust, it seems that estoppel should not be allowed to create a remedy, at least if there is some other relief possible.¹¹ It is submitted that the true solution is to abandon the language of estoppel and to allow an action analogous to deceit.¹² The defendant by his silence, when it was his duty to speak, has caused the plaintiff to be misled to his injury. Even the jurisdictions that insist on applying the principle of *Derry v. Peek*¹³ would have no difficulty with this, as the defendant, by hypothesis, is aware of all the facts. His intent in keeping silence is of no consequence.¹⁴ This remedy insures a just assessment of damages in each case, and, if the analysis of the decisions has been correct, it merely enforces legal obligations already recognized.

THE RIGHT TO APPEAR ON THE BALLOT UNDER THE PARTY NAME. — The right of individuals or groups to make exclusive use of a party name, or hold a position in the party organization, was not recognized at common law.¹ But universal statutes in this country make the nomination by a party a condition precedent to the right to appear on the official ballot under the party name.² In determining this right the courts must necessarily decide who is in fact the regular nominee of the party.³ The custom of the party in the absence of specific legislative provision is the only test of regularity.

difficulty. A late New Hampshire case contains an excellent discussion of this. See *Conway National Bank v. Pease*, 82 Atl. 1068, 1074, 1076 (N. H.).

¹¹ *Fall River National Bank v. Buffinton*, 97 Mass. 498. See *Ogilvie v. West Australian Mortgage and Agency Corporation, Limited*, [1896] A. C. 257, 270. This is not the only instance in the law where the remedy by estoppel is arbitrary and unjust. See *EWART, ESTOPPEL*, 226 *et seq.*

¹² Two cases seem to have been decided on this theory. The form of the action does not appear, but only the damages were recovered rather than the total value of the *res* nominally concerned. *Commercial National Bank v. Nacogdoches Compress and Warehouse Co.*, 133 Fed. 501. See *In re Romford Canal Co.*, 24 Ch. D. 85, 92, 93. An interesting analogy to this is found in a recent case which enjoined ejectment until the owner of the land had reimbursed in full one who had expended money on the land under a parol license. The right in the licensee to recover the money expended rather than the value of the alterations to the licensor is the conspicuous feature of this case. *Johnson v. Bartron*, 137 N. W. 1092 (N. D.).

¹³ *L. R.* 14 A. C. 337.

¹⁴ *Foster v. Charles*, 7 Bing. 105.

¹ *McKane v. Adams*, 123 N. Y. 609, 25 N. E. 1057; *Kearns v. Howley*, 188 Pa. St. 116, 41 Atl. 273. If the election of party delegates or committees is regulated by statute, the courts will give effect to a valid election in a primary. *Walling v. Lansdon*, 15 Idaho, 282, 97 Pac. 396, 402.

² For a short history of the ballot laws, see *Matter of Madden*, 148 N. Y. 136, 139, 42 N. E. 534, 540.

The statutes vary greatly in detail in the different states, and tend to-day to become more complex. But in their outlines they are substantially similar, and it seems that the conflicting decisions are often due rather to a difference in principle than to the words of the statutes on which the courts are eager to distinguish opposing cases. It must always be remembered, however, that general principles are likely to be replaced in any particular case by a legislative provision.

³ It has often been said that this is a political and not a judicial question. This sometimes means, apparently, that the courts will follow the decision of a party tribunal. *Davis v. Hambrick*, 22 Ky. L. Rep. 815, 818, 58 S. W. 778, 780; *Potter v.*

Accordingly the courts will favor the nominees of a local convention held under the regular call of the party committee, as against the nominees of an opposing convention.⁴ But if the state convention decides in favor of the latter, its decision will be accepted to exclude those who without this subsequent decision would have been the regular nominees.⁵ These rules, since they are based on a recognition of party custom, should apply also to the decision of the national party on two rival state tickets, a decision usually made conclusive by the custom of the state party, though the statute does not itself recognize the national organization.⁶

But under primary laws, recognition of party custom is not usually called for. The legislature in legal effect gives the right to go on the ballot under the party name not to those nominated by the party, but only to those nominated under certain rules prescribed by the state.⁷ The interesting question which has arisen in several recent cases is whether a primary nominee may remain on the ballot under the name of a party whose national organization he is actively opposing.⁸ If he were removed, the recognition of party custom would again be nec-

Deuel, 149 Mich. 393, 396, 112 N. W. 1071, 1072. But this, as explained above, is not because of lack of jurisdiction. Sometimes it means that the legislature has not provided, or intended, an appeal from the decision of the officer certifying the names to the election commissioners, or from a special administrative board. *State ex rel. Chapman v. Miller*, 52 Oh. St. 166, 39 N. E. 24; *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964. But this does not make the question less a judicial one. Many courts, anxious to avoid a decision, have allowed two sets of contesting nominees to appear under the party name. *People ex rel. Eaton v. District Court*, 18 Colo. 26, 31 Pac. 339; *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35; *Stephenson v. Boards of Election Commissioners*, 118 Mich. 396, 76 N. W. 914; *State ex rel. Gillis v. Johnson*, 18 Mont. 556, 46 Pac. 440. But decisions directing both to be placed on the ballot where only one appeared before show clearly that there is jurisdiction to take action. *Sims v. Daniels*, 57 Kan. 552, 46 Pac. 952; *Shields v. Jacob*, 88 Mich. 164, 50 N. W. 105. The doctrine is discredited or modified by statute or decision even in the states where it originated. *State ex rel. Rose v. Piper*, 50 Neb. 42, 69 N. W. 384; *McDonald v. Hinton*, 114 Cal. 484, 46 Pac. 870; *Spencer v. Maloney*, 28 Colo. 38, 62 Pac. 850.

⁴ *State ex rel. Wolfe v. Falley*, 9 N. D. 450, 83 N. W. 860; *Williams v. Lewis*, 6 Idaho 184, 54 Pac. 619; *State ex rel. Howells v. Metcalf*, 18 S. D. 393, 100 N. W. 923; *Marcum v. Ballot Commissioners*, 42 W. Va. 263, 26 S. E. 281; *Hutchinson v. Brown*, 122 Cal. 189, 54 Pac. 738; *In re Nomination of Huey*, 19 Pa. Co. Ct. Rep. 138.

⁵ *State ex rel. Buttz v. Liudahl*, 11 N. D. 320, 91 N. W. 950; *Matter of Fairchild*, 151 N. Y. 359, 45 N. E. 943; *In re Pollard*, 25 N. Y. Supp. 385; *Cain v. Page*, 19 Ky. L. Rep. 977, 42 S. W. 336; *Bogges v. Buxton*, 67 W. Va. 679, 69 S. E. 367. *Cf. State ex rel. O'Malley v. Lesueur*, 103 Mo. 253, 15 S. W. 539. *Cf. Twombly v. Smith*, 25 Colo. 425, 55 Pac. 254; *Republican Executive Committee v. Wetzel County Court*, 68 W. Va. 113, 69 S. E. 522. But the power of the state organization over local officers is not everywhere wholly arbitrary. *State ex rel. Yates v. Crittenden*, 164 Mo. 237, 64 S. W. 162.

⁶ See *State ex rel. Nebraska Republican State Central Committee v. Wait*, 138 N. W. 159 (Neb., 1912). The statute here specifically recognized the national party, and the nominees did not claim to represent a faction of that party. See *State ex rel. Dahlman v. Piper*, 50 Neb. 25, 69 N. W. 378. See especially *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964, where the state organization prevailed because it was made by statute the judge of regularity.

⁷ *Stewart v. Polley*, 137 N. W. 565 (S. D., 1912).

⁸ This situation may arise when the state party and its electors refuse to indorse a presidential nominee, or when there is a split in a state party organization after a nomination is made. But the same question would be involved if a candidate for governor announced that he would carry out only the policies of the party opposing him, and appoint only its members to office.

essary in determining what committee could fill the vacancy, and the decision of the national organization on rival state committees should then be recognized by the courts.⁹

Is there, then, any principle by which nominees may be removed from the ballot? Even under the convention laws it is held that a party organization cannot revoke for any cause a nomination it has regularly made.¹⁰ The nominee has a vested right. He has a status similar in many respects to that of a public officer.¹¹ Thus in a recent case nominees of the Republican party for presidential electors accepted places on the ballot as nominees of the Progressive party. The court held that their first position thereby became vacant, applying the common-law principle that the acceptance of a public office with inconsistent duties vacates one already held. *State ex rel. Nebraska Republican State Central Committee v. Wait*, 138 N. W. 159 (Neb.). This decision seems correct. But except in the case of nominees for presidential electors the duty to represent one party between nomination and election¹² is not necessarily inconsistent with the support of another. And even if non-performance of duty were a ground for subsequent removal, it would be very difficult in most cases to determine whether there had been non-performance of so vague and uncertain a duty.

But the whole purpose of conferring the right to use the party name on the ballot is to enable voters, without personal knowledge of the individual nominee, to vote for men supporting the party principles. If the representation on the ballot is deceptive, the law is more than nullified. There is certainly no injustice to the nominee in depriving him of his right when he is making an unconscionable use of it to defraud the voters. But it is argued that the courts alone cannot accomplish this result,¹³ because the statute has said that the primary nominee shall go on the ballot. This, however, seems to do no more than create for him a vested right or status. The fact that this right is purely statutory should

⁹ See *State ex rel. Nebraska Republican State Central Committee v. Wait*, *supra*.

¹⁰ *Sterling v. Bones*, 87 Md. 141, 39 Atl. 424; *People ex rel. Simpson v. Board of Police Commissioners*, 10 N. Y. Misc. 98, 31 N. Y. Supp. 112; *Le Bert v. Shirley*, 24 Colo. 269, 50 Pac. 862. The last two cases are perhaps explainable on the ground that the convention has no authority from the party to rescind a nomination. But while the convention is still in session it may rescind. *Phillips v. Gallagher*, 73 Minn. 528, 76 N. W. 285; *Phillips v. Smith*, 25 Colo. 398, 55 Pac. 177; *In re Nash*, 36 N. Y. Misc. 113, 72 N. Y. Supp. 1057.

¹¹ *State ex rel. Rinder v. Goff*, 129 Wis. 668, 109 N. W. 628. See *State ex rel. O'Malley v. Lesueur*, 103 Mo. 253, 264, 15 S. W. 539, 542. But see *Attorney General v. Drohan*, 169 Mass. 534. An office need have no duration, or emoluments. See *State ex rel. Clark v. Stanley*, 66 N. C. 59, 63. The death of a nominee creates a "vacancy." *NEB., COMP. STAT., 1911, c. 26, § 118 a.*

¹² By regulating the election and creating this quasi office the state at most only makes legal the moral duty to stand for the party ticket and principles during the campaign. Any duty after the election must be purely a moral one to the party.

¹³ *State ex rel. Kennedy v. Martin*, 24 Mont. 403, 62 Pac. 588; *Sbarboro v. Jordan*, 44 Cal. Dec. 489 (1912). The California statute specifically recognizes the state organization as the party. It may be said that under such circumstances the voters would only be justified in considering the nominees as the candidates of the state organization. Even nominees for presidential electors are nominees of the state party, and a legislature could deprive the national party of all power over them. But it is a fact that voters consider that they represent the national party, and are deceived if they do not. But see *Breidenthal v. Edwards*, 57 Kan. 332, 46 Pac. 469.

not prevent the application to it, after its creation, of common-law principles of justice, in situations for which the legislature could not, or did not, provide.¹⁴ The only means to prevent the statute's becoming an instrument for the defrauding of voters is to declare vacant the position of a nominee who makes such a use of it.¹⁵ Furthermore, the statute itself recognizes certain causes creating vacancies, and their enumeration is not necessarily exclusive.¹⁶ The same enumeration in regard to public officers does not annul the common-law ground for removal when an office with inconsistent duties is accepted.¹⁷ The right or status of a nominee is of a new and peculiar character which calls for the application of a new means of attaining justice.¹⁸ It seems, therefore, that the appearance of a man's name under the name of a party which he is actively opposing is such a fraud on the voters as to justify a court in declaring vacant his position on the ballot.

EMPLOYEES WITHIN THE SCOPE OF THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908. — The federal Employers' Liability Act of 1906 was held unconstitutional because interstate commerce was not sufficiently benefited by imposing an extraordinary liability upon an interstate railroad in favor of employees whose work might in no way concern such commerce.¹ It is submitted that an employers' liability act protecting all workmen whose efficiency might substantially affect interstate commerce would be valid in view of recent decisions that the Safety Appliance Act² can constitutionally include all cars of a train in which there is an interstate car,³ or even a train purely intra-

¹⁴ See *State ex rel. Gray v. Olsen*, 137 N. W. 561, 564 (S. D., 1912), where the majority denied relief on the ground that the party offered no nominees to take the place of those sought to be ousted.

¹⁵ Party custom is here immaterial except as to who may fill the vacancy. The inquiry is solely whether voters are deceived. The principle would not extend to a nomination obtained by fraud, for the nominee might still represent the party principles. It might seem desirable, however, to allow the party to avoid such a nomination. Fraud in obtaining signatures to secure a place on the primary ballot is immaterial after the nomination is made. *Marks v. Davis*, 125 Pac. 344 (Kan., 1912). But it would seem that such signatures might be withdrawn before the nomination.

¹⁶ But see *State ex rel. Vance v. Wilson*, 30 Kan. 661, 2 Pac. 828.

¹⁷ *Attorney General ex rel. Moreland v. Common Council*, 112 Mich. 145, 70 N. W. 450; MICH., COMP. LAWS, 1897, 2993, 3001 *et seq.* Cf. *State ex rel. Crawford v. Anderson*, 136 N. W. 128 (Ia., 1912). Insanity may be a ground for removal though not specially provided for. *Long v. Bowen*, 15 Ky. L. Rep. 276, 23 S. W. 343.

¹⁸ It is usually held that a party name cannot be chosen so similar to that of an existing party as to deceive the voters. *Phillips v. Curley*, 28 Colo. 34, 62 Pac. 837. Only an extension of this principle is called for. See also *In re Folks*, 134 N. Y. App. Div. 376, 119 N. Y. Supp. 71.

¹ *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141. See 25 HARV. L. REV. 548.

² Act of March 2, 1893, U. S. COMP. STAT., 1901, p. 3174, as amended March 2, 1903, U. S. COMP. STAT., SUPP. 1909, p. 1143. In terms this statute applies to all cars used on any railroad engaged in interstate commerce and gives every employee a right of action. This seems as broad as the first Employers' Liability Act, but the construction of the court saves it. *Southern Ry. Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2.

³ *Norfolk & Western Ry. Co. v. United States*, 177 Fed. 623; *United States v. International & G. N. R. Co.*, 174 Fed. 638.

state if its operation might directly affect an interstate train.⁴ For interstate commerce is as much dependent upon the security of such workmen as upon the security of the rolling stock. And protection of human instrumentalities through the imposition of legal liability in their favor is almost as direct as the protection of mechanical instrumentalities through requiring safety appliances. But though the broadest statute possible was probably desired, the Employers' Liability Act of 1908⁵ only includes employees of interstate railroads injured while employed in interstate commerce by such railroads, — a limitation to such employees as are clearly within federal protection.⁶ It has been pointed out that the fact that the injury is from an interstate source is immaterial since the power to regulate is derived from the effect of the injury.⁷ And the requirement that the carrier be engaged in interstate commerce is superfluous since if the employee is so engaged, the carrier is also.⁸ The wording of the statute excludes the possibility of an employee's acquiring an interstate status protecting him constantly and requires employment in interstate commerce at the moment he is injured.⁹ Moreover, "employed" means actual engagement in the work, as is shown by cases excluding an employee traveling on a train, whether interstate or not, to reach an interstate train which he is to operate.¹⁰

A man can only be employed in interstate commerce by railroad, if in some way his work involves a relation with an interstate train. A train is interstate within the act if it includes an interstate car.¹¹ A car containing a single article of interstate commerce is interstate¹² although the car does not go outside the state.¹³ Though a car is empty,¹⁴ or merely being delivered to make up a train,¹⁵ its operation may be interstate commerce.

Although the car is interstate and the employee has a substantial connection with its operation, the act requires actual employment in interstate commerce. Any employment, such as that of the crew, closely affecting the movement of an interstate train,¹⁶ is so directly connected with its operation as to be within the act. This would include an employee cutting an intrastate car out of an interstate train.¹⁷ Moreover,

⁴ *Southern Ry. Co. v. United States*, *supra*.

⁵ Act of April 22, 1908, U. S. COMP. STAT., SUPP. 1909, p. 1171.

⁶ *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169.

⁷ *Second Employers' Liability Cases*, *supra*; *Colasurdo v. Central R. of New Jersey*, 180 Fed. 832.

⁸ *Colasurdo v. Central R. of New Jersey*, *supra*.

⁹ See *Pedersen v. Delaware, L. & W. R. Co.*, 197 Fed. 537, 540; *Colasurdo v. Central R. of N. J.*, 180 Fed. 832, 837; 25 HARV. L. REV. 740. *Contra*, *Behrens v. Illinois Central R. Co.*, 192 Fed. 581. This case overlooks the fact that though Congress could have gone this far, it did not.

¹⁰ *Feaster v. Philadelphia & Reading Ry. Co.*, 197 Fed. 580; *Lamphere v. Oregon R. & Navigation Co.*, 193 Fed. 248. Cf. *Bennett v. Lehigh Valley R. Co.*, 197 Fed. 578; *Zachary v. North Carolina R. Co.*, 156 N. C. 496, 72 S. E. 858.

¹¹ *Neil v. Idaho & W. N. R. Co.*, 125 Pac. 331 (Idaho).

¹² See THORNTON, FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS, 38.

¹³ *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958. See 25 HARV. L. REV. 741.

¹⁴ *Malott v. Hood*, 201 Ill. 202, 66 N. E. 247.

¹⁵ *Mobile, etc. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

¹⁶ Such as train dispatchers, telegraph operators, switchmen, signalmen, etc.

¹⁷ *Carr v. New York Central & H. R. R. Co.*, 136 N. Y. Supp. 501. Cf. *Winkler v.*

work involving the every-day care of the train or roadbed,¹⁸ or the care of subjects of transportation,¹⁹ is employment in interstate commerce. Thus, an employee in a roundhouse lifting ice to place it aboard a train for the use of interstate passengers is within the act.²⁰ But a line is drawn by a recent case excluding the crew of an intrastate train hauling water to a tank from which other employees were to supply interstate trains. *Missouri, Kansas, & Texas Ry. v. Fesmire*, 150 S. W. 201 (Tex., Ct. Civ. App.). The crew were only concerned with the intrastate carriage of the water and had no direct connection with the interstate train.

The repair of interstate instrumentalities raises somewhat more doubtful questions. Workmen making slight repairs to interstate cars are within the act, because they plainly assist the car on its journey.²¹ But if the repair necessitates the car's withdrawal from use for a considerable time the journey has ceased, and repair is no more interstate commerce than is manufacture of new cars.²² Work on the roadbed is difficult to classify. Men building a new roadbed, as men manufacturing new cars, though facilitating interstate commerce do not so directly assist in the transportation of the subjects thereof as to come within the act. Consequently in a recent case it was held that work on a bridge on which a track to carry interstate trains was to be laid was not interstate commerce. *Pedersen v. Delaware, Lackawanna & Western R. Co.*, 197 Fed. 537 (C. C. A., Third Circ.). It seems impossible, however, to distinguish in this regard slight repairs to a track over which interstate trains pass from slight repairs to an interstate car,²³ but a man apparently making such repairs was refused recovery in a recent case. *Pierson v. New York, Susquehanna & Western R. Co.*, 85 Atl. 233 (N. J., Ct. Err. and App.).

WHAT LAW GOVERNS MARITIME LIENS. — It is usually for the advantage of all parties having an interest in a ship, whether such interest be in the nature of ownership or security, that she should be actively engaged in commerce and not left to rot in port. But to continue in active employment she must have supplies and services. To obtain them she

Philadelphia & Reading Ry., 4 Penn. (Del.) 80, 53 Atl. 90. *Contra*, Van Brimmer v. Texas & Pacific Ry. Co., 190 Fed. 394.

¹⁸ Such as car-wipers, car-inspectors, porters, track-walkers, etc.

¹⁹ Such as ticket-sellers, baggagemen, gatemen, station porters, etc. But see *Zachary v. North Carolina R. Co.*, 156 N. C. 496, 500, 72 S. E. 858, 859. A clerk taking the numbers of interstate cars after they have reached the end of their journey has been held without the act. *St. Louis, etc. Ry. v. Seale*, 148 S. W. 1099 (Tex., Ct. Civ. App.).

²⁰ *Freeman v. Powell*, 144 S. W. 1033 (Tex., Ct. Civ. App.).

²¹ *Johnson v. Great Northern Ry.*, 178 Fed. 643; *Darr v. Baltimore & Ohio R. Co.*, 197 Fed. 665. *Cf.* *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 31 Sup. Ct. 617. Though an extreme example, it would seem that a physician removing a cinder from the eye of an engineer about to start on an interstate run would be engaged in interstate commerce although perhaps not an "employee" within the act.

²² *Heimbach v. Lehigh Valley R. Co.*, 197 Fed. 579. *Contra*, *Northern Pacific Ry. v. Maerkl*, 198 Fed. 1. This decision seems indefensible.

²³ *Zikos v. Oregon R. & Navigation Co.*, 179 Fed. 893; *Colasurdo v. Central R. of N. J.*, *supra*. *Contra*, *Taylor v. Southern Ry. Co.*, 178 Fed. 380. A wrecking crew would seem to be in the same category.

must have credit. Admiralty law in most countries secures this for her by implying a maritime lien in favor of those who furnish such necessities and providing that the last maritime lien to attach shall take precedence over all non-maritime liens and all previous maritime liens.¹ Under the influence of the common law, however, this broad principle was restricted in England.² Though a maritime lien was allowed for seamen's wages, pilotage, towage, etc., the "materialman," *i. e.*, the man furnishing necessary supplies and the like, to a ship in port, acquired no maritime lien unless a formal bottomry bond was executed.³ English admiralty jurisdiction was enlarged by Victorian statutes.⁴ But these statutes merely give the materialman a right to sue in admiralty and arrest the ship if she has been supplied in a foreign port and the owner is not domiciled in England.⁵ The lien attaches only from the date of arrest, and in the distribution of the proceeds it is postponed to all previously existing secured claims. The Scotch admiralty law seems to take the same view.⁶ Admiralty law as adopted in the United States allows the materialman a maritime lien if the necessities have been furnished in a foreign port on the credit of the ship, but not otherwise.⁷ State statutes, however, giving materialmen supplying domestic vessels in their home port maritime liens have been enforced in the federal courts, on the ground that they give a cause of action within the exclusive admiralty jurisdiction of the federal judiciary.⁸ But when they attempt to create maritime liens unknown to the "general admiralty law" they are held unconstitutional as interfering with the exclusive control of Congress in matters of interstate and foreign commerce requiring uniformity.⁹

Such unfortunate variations in the maritime law as applied in different

¹ See *The J. E. Rumbell*, 148 U. S. 1, 9; *The St. Iago de Cuba*, 9 Wheat. (U. S.) 409, 416; *The Young Mechanic*, 2 Curt. (U. S.) 404, 406-413; *The De Smet*, 10 Fed. 483, 489, note. The last maritime lien takes precedence over previous liens, for their holders have benefited by the services rendered; also over all subsequent non-maritime liens, since they attach subject to existing interests.

² See *The Two Ellens*, L. R. 4 P. C. 161, 166; *The Scotia*, 35 Fed. 907, 908.

³ *The Neptune*, 3 Knapp 94.

⁴ See THE ADMIRALTY COURT ACT, 1840 (3 & 4 VICT. c. 65); THE ADMIRALTY COURT ACT, 1861 (24 VICT. c. 10).

⁵ *The Pacific*, Brown & L. 243; *The Henrich Bjorn*, 11 A. C. 270; *The Rio Tinto*, 9 A. C. 356. Consequently the claim of a mortgagee takes precedence over that of a materialman in the distribution of proceeds. *The Two Ellens*, *supra*; *The Scio*, L. R., 1 A. & E. 353; *The Lyons*, 6 Aspin. 199. These statutes cover not only British ships, but regulate the relief furnished to foreign ships in foreign ports as well. *The Mecca*, [1895] P. 98.

⁶ *Clark v. Hine*, 45 Scot. L. Rep. 879. See *Carrie v. McKnight*, [1897] A. C. 97, 101, 103, 108.

⁷ *The General Smith*, 4 Wheat. (U. S.) 438; *The Lottawanna*, 21 Wall. (U. S.) 558; *The Kalorama*, 10 Wall. (U. S.) 208. A lien is also given for supplies furnished to a domestic vessel masquerading as a foreign vessel. *The St. Iago de Cuba*, 9 Wheat. (U. S.) 409. The ground for this restriction on the broad doctrine of the civil law is that the credit of the ship is only needed when the credit of the owner cannot be properly investigated and obtained.

⁸ *The Young Mechanic*, *supra*; *The J. E. Rumbell*, *supra*. A lien called maritime by the state statute creating it, but not maritime in its nature, is not within the admiralty jurisdiction of the federal courts. *People's Ferry Co. v. Beers*, 20 How. (U. S.) 393. Nor can the state courts give relief. *Cf. The Roanoke*, 189 U. S. 185.

⁹ *The Roanoke*, *supra*. *Cf. People's Ferry Co. v. Beers*, *supra*. For a full discussion of this subject see 21 HARV. L. REV. 332.

ports make it important to determine by what law maritime liens are created and enforced. It seems clear that the creation of a lien must be governed by the law of the place where the vessel is situated when the services are rendered.¹⁰ Thus if an English vessel is supplied with necessities in an American or French port and libeled in the United States the materialman's lien is upheld.¹¹ Conversely it is submitted that for supplies furnished to an English vessel in an English port, no lien should be recognized even though the vessel were libeled in the United States.¹² The creation of liens for services on the high seas, as for seamen's wages, is on the same theory governed by the law of the ship's flag.¹³ But though international comity requires that the creation of a lien by a foreign law be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libeled and sold.¹⁴ Thus in a recent case where a Russian ship mortgaged in England was libeled and sold in Scotland, the law of the forum was applied and the English mortgagee preferred to an intervening Danish materialman.¹⁵ *Constant v. Klompus*, 50 Scot. L. Rep. 27.

STATE TAXATION OF INTERSTATE COMMERCE. — To what extent a state may tax property engaged in interstate commerce is still a troublesome question.¹ It is clear that a tax distinctly laid on commerce itself,

¹⁰ The *Scotia*, *supra*; The *Maud Carter*, 29 Fed. 156. Cf. The *Maggie Hammond*, 9 Wall. (U. S.) 435. See WHARTON, *CONFLICT OF LAWS*, 3 ed., §§ 322, 358.

¹¹ The *Scotia*, *supra*. In England, however, whether or not the right is recognized, no jurisdiction is given to any court to enforce it.

¹² Cf. The *Infanta*, 13 Fed. Cas. No. 7030. Note that a French decision *contra* was regarded as erroneous but not void, as it was based on a mistake in English law. *Castrique v. Imbrie*, 4 H. L. Cas. 414.

¹³ The *Olga*, 32 Fed. 329; The *Velox v. Werke*, 21 Fed. 479; The *Angela Maria*, 35 Fed. 430; The *Belvidere*, 90 Fed. 106. But cf. The *Tagus*, [1903] P. 44, where the law of the forum was applied and the master of a foreign ship given a maritime lien for wages for a series of voyages, although the law of the flag gave him one only for the last voyage. The explanation is probably that if a lien has ever existed, its "staleness" by analogy to statutes of limitations is to be determined by the law of the forum.

¹⁴ *Clark v. Hine*, 45 Scot. L. Rep. 879; The *Union*, Lush. 128; The *Selah*, 40 Sawy. 40, 21 Fed. Cas. No. 12,636. Cf. *Harrison v. Sherry*, 5 Cranch (U. S.) 289. See The *Scotia*, 35 Fed. 907, 910; STORY, *CONFLICT OF LAWS*, §§ 323, 423 b.

¹⁵ It might be contended that the essential nature of a maritime lien is that it gives a vested right superior to all prior non-maritime interests, and that to postpone it to a mortgage is to refuse to recognize its existence. But the foreign sovereign, though he may pass a valid title to a ship even in erroneous proceedings, as in *Castrique v. Imbrie*, *supra*, has not jurisdiction to give a qualified interest, which will forbid the sale of a ship in another forum later acquiring jurisdiction, or specify how the proceeds arising in that forum shall be distributed. Elsewhere the lien need only be regarded as giving such rights as the creating sovereign had jurisdiction to grant, namely, a claim against the vessel for which the sovereign of the forum may furnish such a remedy as he sees fit. It is submitted, however, that the only relief given a materialman in the English Admiralty Act is grossly inadequate.

¹ A state cannot levy a privilege tax on interstate commerce. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 6 Sup. Ct. 635. Nor on interstate corporations as a condition of doing business. *Pullman Co. v. Kansas*, 216 U. S. 56, 30 Sup. Ct. 232. But if as a condition of doing local business, it is constitutional. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214. A cab service operated by a railroad to carry inter-

as, for example, on freight as such or the gross receipts from the transportation, comes within the prohibition of the Constitution, although there is no discrimination in favor of intrastate commerce, and even though Congress has not acted.² Moreover property actually in the course of transit cannot then be taxed by the state;³ and a state court has held that the length of time it remains within its borders is immaterial.⁴ When, however, the property has completed the interstate trip, and is at rest awaiting sale, even in the original packages, it has come within the taxing jurisdiction of the state.⁵ And the same result is reached when it is thus held over at an intermediate point.⁶ If the property is at the place of shipment and awaiting transportation it is not yet in transit.⁷ Moreover, if it has been started on an interstate journey and is stopped for a purpose not incidental or caused by the transportation it then becomes subject to state taxation.⁸ Thus grain stopped *en route* for inspection and testing,⁹ and cattle being fattened at an intermediate point,¹⁰ were held taxable, although through bills of lading were outstanding. In accord with these cases a recent case has held that flour on an interstate transit stopped *en route* for repacking and blending is taxable by the state. *In re Holt and Co.*, 35 N. J. L. J. 307 (State Board of Equalization of Taxes).

A consideration of these authorities shows a general statement that a state cannot tax interstate commerce to be unsound. The important object of the interstate commerce clause was to prevent internal dissensions arising from attempts by a state to secure to itself undue advantages over other states by discriminatory regulations of commerce.¹¹ For this reason any tax, as shown above, which results either in state

state passengers to and from its station is not interstate commerce, and is not exempt from a state privilege tax. *State ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 24 Sup. Ct. 202. This case seems to be argumentatively a step toward breaking down the distinction between privilege and property taxes in interstate commerce. See 21 HARV. L. REV. 618.

² *Case of the State Freight Tax*, 15 Wall. (U. S.) 232; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638. But a tax on the gross receipts in lieu of all other taxes is constitutional. *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211.

³ *Kelley v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259.

⁴ *Coe v. Errol*, 62 N. H. 303.

⁵ *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

⁶ *Pittsburg and Southern Coal Co. v. Bates*, 156 U. S. 577, 15 Sup. Ct. 415. But it is still interstate commerce for the purpose of the Interstate Commerce Act of 1887. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279.

⁷ *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475. *Contra*, *Creamer v. Inhabitants of Bremen*, 91 Me. 508, 40 Atl. 555. In *Coe v. Errol*, p. 525, Mr. Justice Bradley lays down the rule that goods are in interstate commerce "when actually started in the course of transportation to another state, or delivered to a carrier for such transportation." This *dictum* has been adopted as a test by the Supreme Court. See *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 110, 32 Sup. Ct. 653, 656.

⁸ *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 23 Sup. Ct. 266.

⁹ *People v. Bacon*, 243 Ill. 313, 90 N. E. 686.

¹⁰ *Wagoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153. This line of cases goes beyond the rule of Mr. Justice Bradley in *Coe v. Errol*. See note 7, *supra*.

¹¹ See THE FEDERALIST, No. 7.

discrimination¹² or taxation of commerce as commerce is unconstitutional. But unless the tax does discriminate or is a tax on the commerce as such it is not to be assumed that the state has surrendered a sovereign power so essential to the life of a government. In spite of the language of the United States Supreme Court in some cases, it is submitted that a state tax on interstate commerce is constitutional if it does not fall within one of these two classes. In many cases where a tax on property in transit was assailed as a violation of the commerce clause the real question was whether the property had acquired a taxable *situs*.¹³ When property is in a position to demand apparently permanent protection from a state it has acquired such a *situs*. The mere fact that a tax in return for that protection will indirectly affect interstate commerce should not render it unconstitutional. Property situated and used wholly within the state is admittedly not exempt because it is an instrument of interstate commerce.¹⁴ In *Pullman's Palace Car Co. v. Pennsylvania*,¹⁵ moreover, the United States Supreme Court expressly recognized that, a taxable *situs* having been acquired by a constant average of units remaining within a state, a state tax is not unconstitutional, although the units on which the tax was based were continually in interstate transit. Only a holding¹⁶ that logs delayed in the course of an interstate transit for more than a year by low water are not taxable, is opposed to this theory; and to some extent the decision of the Supreme Court that sheep which took six weeks in transit across a state were not taxable.¹⁷ But if the sheep had taken a much longer time, it is believed that the court could have upheld a state tax without departing from its former decisions. Such a result would be desirable practically and logically sound.

DISCRIMINATION RESULTING IN A FINANCIAL BENEFIT TO THE STATE. — It is well settled that the maximum rates established by the legislature for the transportation of passengers by a common carrier must be reasonable and compensatory¹ and must not result in a denial of the equal protection of the laws. No statute is constitutional therefore which discriminates against a class arbitrarily chosen.² And if the discrimination is in favor of a class arbitrarily chosen it would seem that thereby the equal protection of the laws is taken from all those not

¹² *Woodruff v. Parham*, 8 Wall. (U. S.) 123.

¹³ Usually property in transit does not acquire a taxable *situs*. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *Conley v. Chedic*, 7 Nev. 336.

¹⁴ *The Delaware R. Tax Case*, 18 Wall. (U. S.) 206. See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 5 Sup. Ct. 826, 829.

¹⁵ 141 U. S. 18, 11 Sup. Ct. 876. Mr. Justice Bradley, who wrote the opinion in *Coe v. Errol*, note 7, *supra*, dissented.

¹⁶ *Coe v. Errol*, 62 N. H. 303. The holding on this point was not appealed to the United States Supreme Court, but was cited with approval by Mr. Justice Bradley. See *Coe v. Errol*, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477.

¹⁷ *Kelley v. Rhoads*, see note 3, *supra*. In this case the statute imposed the tax on sheep within the state "for the purpose of grazing."

¹ *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400.

² *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. 255.

in the designated class.³ A discrimination based on reasonable grounds is proper,⁴ and the courts are very ready to find such reasonable grounds for classification. Thus there would be no illegal discrimination against the rest of the traveling public were lower rates provided for persons traveling in such bodies or at such times that the expense of transportation was made less.⁵ In some cases a discrimination which would otherwise be illegal might be proper as an exercise of the police power. Whether this is considered as a distinct justification of the discrimination, or whether the classification is deemed reasonable because of the police power, the result is the same. The police power would seem to justify a discrimination, otherwise illegal, to the same extent that it authorizes a taking of property otherwise without due process of law. A statute providing lower rates for school children, thereby putting the railroad to expense, would seem to be, *primâ facie*, both a discrimination against the rest of the traveling public and a deprivation of property of the railroad without due process of law; but such a statute was considered a proper exercise of the police power because a real stimulus was thereby given to education. More children attended school when there was cheaper transportation.⁶ Similarly a discrimination resulting in a benefit to the public health,⁷ or one which aided the state in its function of protection and maintenance of the peace, would seem to be proper.

The interesting question is raised in a recent case whether a discrimination resulting merely in a financial benefit to the state is justified. A statute provided that members of the state militia while traveling under orders should be carried at less than the regular maximum passenger fare, at a rate which did not deprive the railroad of property without due process of law. The court found that there was no illegal discrimination between the ordinary passenger and the militia. *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 137 N. W. 2 (Minn.). It is hard to find any reasonable distinction as to expense of transportation between the militia and other travelers, except possibly in the fact that the former often travel in large bodies. But the statute is not limited to the militia while so traveling. Considered as an exercise of the police power it is difficult to see how the transportation of the militia is thereby facilitated or the state aided in its function of protection and maintenance of the peace.⁸ In a recent case a statute providing that policemen should be carried free on trolley cars was held constitutional as a proper exercise of the police power because the presence of the police might be necessary at any time to preserve the peace or enforce ordinances on the cars. *State v. Sutton*, 84 Atl. 1057 (N. J.). Even these considerations are not present in the case of the militia, and there seems to be no public benefit from providing a reduced fare for them except that the public treasury

³ *State v. Chicago, Milwaukee & St. Paul Ry. Co.*, 137 N. W. 2 (Minn.). See *Conolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 557, 22 Sup. Ct. 431, 438.

⁴ Opinion of the Justices, 166 Mass. 589; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250.

⁵ See *Commonwealth v. Interstate Consolidated Ry. Co.*, 187 Mass. 436, 73 N. E. 530.

⁶ *Commonwealth v. Interstate Consolidated Ry. Co.*, *supra*; and see same case upon appeal, 207 U. S. 79, 85, 28 Sup. Ct. 26.

⁷ See *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358.

⁸ *Ex parte Gardner*, 84 Kan. 264, 113 Pac. 1054.

and the taxpayer are relieved of part of the burden of the expense of their maintenance.

It has been held that the deprivation of property resulting from a statute requiring policemen to be carried free is not constitutional where there is only a financial benefit to the state.⁹ The providing of funds to carry on the functions of the state has never been considered an exercise of the police power. Nor would that power seem to include a lessening of the expense of government. Apart from the police power this action of the state can only be considered as the exercise of a power whose object is the same as that of taxation. But taxation must be uniform. It is difficult to see how the same purpose, to accomplish which a direct discrimination is not permitted, can supply any proper justification for a discriminatory regulation of rates. A different conclusion might be reached if the party discriminated against had a peculiar responsibility in aiding the state in carrying on the function the expense of which is lessened by the classification.¹⁰ But in the Minnesota case the traveling public had no such responsibility.¹¹

INSURANCE AS A FRAUDULENT CONVEYANCE OR PREFERENCE. — It is properly said that "there is no mystery or charm about life insurance."¹ But this proposition is not apparent in all the decisions which treat the question when insurance effected by a failing debtor in favor of a creditor or volunteer is voidable by his general creditors. The question has arisen most often where an insolvent attempts to provide for a wife, children, or other dependents by setting aside a portion of his income in the payment of premiums. In most states the matter is regulated by statute,² but in others a diversity of results is reached. The assignment of a policy to a volunteer is almost uniformly held fraudulent as to creditors.³ It is a

⁹ *Wilson v. United Traction Co.*, 72 N. Y. App. Div. 233, 76 N. Y. Supp. 203. It is submitted that the case cited by the Minnesota court in support of the contrary of this proposition should not be construed as so holding. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 29 Sup. Ct. 192.

¹⁰ Such a situation arises when a railroad is required to pay part of the expenses of a state railroad commission. *Charlotte, etc. Ry. Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct. 255.

¹¹ The established rule allows none to question the constitutionality of a statute because of discrimination, except one whose constitutional rights are thereby infringed. *Brown v. Ohio Valley Ry. Co.*, 79 Fed. 176; *Kansas City v. Union Pacific R. Co.*, 59 Kan. 427, 53 Pac. 468. Therefore the decision of the Minnesota court seems to be correct, since the objection is raised by the railroad against which there has been no discrimination.

¹ See *Merchants' and Miners' Transportation Co. v. Borland*, 53 N. J. Eq. 282, 285, 31 Atl. 272, 273.

² Twenty-eight states now have statutes of varying degrees of leniency to the beneficiary. Under statutes like that in Massachusetts, creditors may recover out of the proceeds of the policy the amount of the premiums, with interest, paid by the debtor with fraudulent intent. MASS., REV. LAWS, 1902, c. 118, § 73. Most lenient to the beneficiary is Tennessee, where all insurance on the husband's life enures to the benefit of his widow and children, free from the claims of his creditors. Both premiums and the face value of the policy may be unlimited in amount. TENN., CODE, 1896, § 4231.

³ *Taylor v. Coenen*, 1 Ch. D. 636; *Bailey v. Wood*, 202 Mass. 562, 89 N. E. 149. *Contra*, *Succession of Hearing*, 26 La. Ann. 326, decided, however, in a civil-law jurisdiction, where the statute of Elizabeth is not in force.

valuable contract right and should be available in the general distribution of the estate.⁴ But where the policy is made payable to the wife or child originally, at least three results have been reached by the courts. The doctrine of the United States Supreme Court⁵ and some others⁶ allows an insolvent husband to devote a moderate part of his income for his family's benefit, entirely free from the claims of creditors, provided there was not actual fraud. Another solution permits the beneficiary to keep the proceeds less the amount of premiums paid by the insolvent.⁷ A third doctrine, which seems correct on principle, gives to the creditors all the proceeds, because they are the result of the investment of a sum fraudulently diverted from the estate.⁸ Where some of the premiums are paid before and some after insolvency, the result has been said to depend on whether all the premiums together are regarded as the consideration for the insurer's promise, or only the first so regarded, and subsequent ones as the fulfilment of conditions.⁹ Under the first view, the creditors would get a part of the proceeds proportionate to the premiums paid after insolvency;¹⁰ under the latter, only such premiums themselves.¹¹ But this latter solution is more technical than just. Since in substance the payment of all the premiums is the consideration, a proportionate division seems fair.

The problem arises less often with regard to other kinds of insurance, but would seem to require an application of the same principles. When an insolvent grants or mortgages property and insures it for the benefit of the grantee or mortgagee, the question whether the insurance proceeds are recoverable as a preference or fraudulent conveyance is wholly separate from that whether the property itself would be recoverable. Though not a substitute for the property,¹² insurance money is the proceeds of a contract of indemnity.¹³ As in the life insurance cases, the controlling consideration should be as to who paid for the contract, for neither individual creditors nor volunteers have a right to receive indemnity at the expense of the general creditors. Where the mortgagee pays all the premiums, he should keep the proceeds, for the estate has not suffered;¹⁴ and where the mortgagor pays all, his creditors should prevail.¹⁵ A more doubtful case arises where the mortgagor defaults

⁴ See 1 MOORE, FRAUDULENT CONVEYANCES, 119.

⁵ *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41.

⁶ *Hendrie and Bolthoff Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209. See *Elliott's Appeal*, 50 Pa. St. 75, 83.

⁷ *Aetna National Bank v. United States Life Ins. Co.*, 24 Fed. 770. See *Pence v. Makepiece*, 65 Ind. 345, 360.

⁸ *Merchants' and Miners' Transportation Co. v. Borland*, *supra*; *Fearn v. Ward*, 80 Ala. 555, 2 So. 114. See 25 AM. L. REV. 185.

⁹ See 25 AM. L. REV. 185, 197.

¹⁰ *Pullis v. Robison*, 73 Mo. 201.

¹¹ *In re Bear and Steinberg*, 11 Nat. Bankr. Reg. 46.

¹² See 1 MOORE, FRAUDULENT CONVEYANCES, 118.

¹³ See 1 MAY, INSURANCE, 4 ed., § 2; RICHARDS, INSURANCE LAW, 3 ed., § 24.

¹⁴ *Cf. McLean v. Hess*, 106 Ind. 555; *Lerow v. Wilmarth*, 9 Allen (Mass.) 382. Thus, if a preferred creditor insures property given him, and it is destroyed, he may retain the insurance money though he could not keep the property.

¹⁵ *North Star Boot and Shoe Co. v. Ladd*, 32 Minn. 381. It is immaterial whether the bankrupt be mortgagor, or grantor, or has never had any interest in the property insured.

after paying some, and thereafter the mortgagee keeps them up on his own account. But here, too, it would seem that the proceeds should be apportioned according to the amount of premiums paid by each.

A recent case raises apparently for the first time the question whether the so-called union mortgage clause¹⁶ in a policy on property mortgaged as a preference introduces a variation.¹⁷ The court held that the mortgagor's trustee in bankruptcy was entitled to the proceeds. *Brown City Savings Bank v. Windsor*, 198 Fed. 28 (C. C. A., Sixth Circ.). As the court says, the clause does no more than protect "the mortgagee against the mortgagor's violation of conditions of the policy."¹⁸ Whether it creates a contract directly between the insurer and the mortgagee or makes the latter the beneficiary of a contract between the insurer and the mortgagor, the mortgagee receives the benefit of any payment. If the mortgagor paid the premiums, as in the principal case,¹⁹ his creditors should recover the proceeds.

RECENT CASES.

BANKRUPTCY — POWER SPRINGING FROM NECESSITY — PURCHASER OF PERISHABLE GOODS AFTER ADJUDICATION PROTECTED. — A mining dredge was attached during a process in a New Mexico court. Within four months after the attachment the owner of the dredge was adjudicated a bankrupt in Illinois. Thereafter, but before actual notice of the bankruptcy proceedings had come to the parties in New Mexico, the dredge was sold under a statute by order of the New Mexico court, because it was "of a perishable nature, and liable to be lost or diminished in value before the final adjudication of the case." The trustee of the bankrupt sought to avoid the sale, on the ground that he was vested with title as of the date of adjudication under § 70 of the Bankruptcy Act, and that the filing of the petition was a *caveat* to all the world. *Held*, that the title of the *bond fide* purchaser for value prevails over that of the trustee. *Jones v. Springer*, 226 U. S. 148, 33 Sup. Ct. 64.

The principal case, to protect the purchaser, invokes the doctrine of a power springing from necessity. Jurisdiction for the application of this doctrine is based on actual custody in situations requiring quick action rather than deliberation. *Jennings v. Carson*, 4 Cranch (U. S.) 2; *Baker v. Baker*, 1 Ventris

¹⁶ The principal provisions of such clauses affecting this question are as follows: the loss is payable to the mortgagee as his interest shall appear; the mortgagee's interest is not invalidated by any act or neglect of the mortgagor, provided the former pays, on demand, premiums in default from the mortgagor. It is uniformly held that such a clause gives the mortgagee an interest distinct from the mortgagor. *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141; *Reed v. Firemen's Ins. Co. of Newark*, 81 N. J. L. 523, 80 Atl. 462.

¹⁷ In the principal case, the court was concerned with whether the proceeds of the policy were recoverable as a preference, within § 60 of the Bankruptcy Act of 1898; but it seems that the same considerations would apply as in determining whether there was a fraudulent conveyance within the Statute of Elizabeth in the life insurance cases.

¹⁸ See principal case, p. 33.

¹⁹ In the principal case, the mortgagee paid all the premiums, but the mortgage contained a provision that such payments should be a further lien on the premises. In effect, the mortgagor paid them.

313. The sale confers title good against all the world irrespective of notice. *Young v. Kellar*, 94 Mo. 581, 7 S. W. 293; *Betterton v. Eppslein*, 78 Tex. 443, 14 S. W. 861. This answers the trustee's objection based on the rule that the filing of the petition in bankruptcy is a *caveat* to all the world and in effect an attachment and injunction. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269; *In re Granite City Bank*, 137 Fed. 818. And moreover this rule has been limited by later decisions mentioned with approval in the principal case. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 26 Sup. Ct. 481, 484; *In re Rathman*, 183 Fed. 913, 924, 925. With the element of necessity absent, it is submitted that the trustee should prevail, because, whether the bankruptcy proceedings are a *caveat* or not, the purchaser cannot save himself by the proviso of § 67 f of the Bankruptcy Act, which protects a purchaser for value, who obtains title by an attachment without notice or reasonable cause for inquiry, since the adjudication dissolved the lien and the entire title and interest was vested in the trustee. BANKRUPTCY ACT OF 1898, §§ 67, 70. Therefore the purchaser would take nothing which could be protected.

BANKRUPTCY — PREFERENCE — INSURANCE OF PROPERTY PREFERENTIALLY MORTGAGED, AS A PREFERENCE. — An insolvent company mortgaged property under circumstances rendering the mortgage voidable as a preference under § 60 of the Bankruptcy Act of 1898. An insurance policy was taken out, containing a standard mortgagee clause, and the mortgage provided that if the mortgagee should pay any premiums, the sum so paid should be a further lien on the premises. The mortgagee paid all the premiums. After a loss, the insurance company paid the mortgagee. *Held*, that the mortgagor's trustee in bankruptcy can recover the proceeds of the policy from the mortgagee. *Brown City Savings Bank v. Windsor*, 198 Fed. 28 (C. C. A., Sixth Circ.). See NOTES, p. 362.

BILLS AND NOTES — CERTIFIED CHECKS — EFFECT IN DISCHARGING MAKER WHEN CERTIFIED AT HIS INSTANCE. — The drawer of a check procured its certification by the bank before delivering it to the payee. The bank closed the following day and the check was dishonored on presentment. *Held*, that the drawer is liable on the check. *Davenport v. Palmer*, 137 N. Y. Supp. 796 (Sup. Ct., App. Div.).

Certification of a check at the instance of the holder discharges the drawer. *Metropolitan National Bank of Chicago v. Jones*, 137 Ill. 634, 27 N. E. 533; *First National Bank of Jersey City v. Leach*, 52 N. Y. 350. By the great weight of authority, however, the drawer is not discharged when the certification has been at his own instance. *Born v. First National Bank of Chicago*, 123 Ind. 78, 24 N. E. 173; *Bickford v. First National Bank of Chicago*, 42 Ill. 238. But see *First National Bank of Washington v. Whilman*, 94 U. S. 343, 345. Two reasons are advanced for releasing the drawer of a check certified in the holder's hands, while the drawer of a bill of exchange continues secondarily liable after acceptance by the drawee: first, the payee foregoes his right to receive the money due him and takes instead the liability of the bank; second, a certified check is regarded in business practically as a bank note, and as the funds in the bank are beyond the drawer's control presumably the payee does not rely on the drawer's extraordinary liability as surety. The latter reason applies equally to a check certified in the drawer's hands, with such force that the absence of the former reason in addition is not enough to justify the different rules of law. Furthermore, as the instrument is the same on its face in both cases, an indorsee, if the principal case is to be followed, could not know what obligation he is buying, and suit would often have to be brought against the drawer before the facts could be ascertained. See 6 HARV. L. REV. 138. The distinction, however, is embodied in the Negotiable Instruments Law,

§§ 187, 188, which was binding on the court in this case. *Cullinan v. Union Surety & Guaranty Co.*, 79 N. Y. App. Div. 409, 80 N. Y. Supp. 58.

BILLS AND NOTES — SET-OFF BY ACCOMMODATED PAYEE OF PROMISSORY NOTE AGAINST INSOLVENT BANK. — The accommodated payee of a promissory note discounted it at the defendant bank which had knowledge of the facts. The bank became insolvent before the note fell due. The payee brought suit in equity to compel the receiver to offset his credit balance in the bank against the amount of the note. *Held*, that the receiver must do so. *Building and Engineering Co. v. Northern Bank*, 206 N. Y. 400, 99 N. E. 1044.

If a negotiable instrument is received with knowledge of a suretyship relation between the parties to the instrument, the ordinary rules of suretyship are held to apply in equity. See *CHALMERS, BILLS OF EXCHANGE*, 7 ed., 224. As between himself and the party accommodated, the accommodating party is in effect a surety. *American National Bank v. Junk Brothers*, 94 Tenn. 624, 30 S. W. 753. See *Latimer v. Wood*, 73 Fed. 1001, 1002. Accordingly, an extension of time to the accommodated party is held to release the accommodating party. See 2 *AMES, CASES ON BILLS AND NOTES*, 82, n. 2. And prior to the Negotiable Instruments Law, the New York court would clearly have recognized the accommodated payee as the party primarily liable, with a right of set-off which equity will protect. *Clute v. Warner*, 8 N. Y. App. Div. 40; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148. However, sections 119, 120, and 192 of the Negotiable Instruments Law have generally been construed strictly as holding the maker of a note liable thereon without regard to the suretyship relation. *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679; *Wolstarholme v. Smith*, 34 Utah 300, 97 Pac. 329. *Contra*, *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50. It has been suggested that the sections in the Negotiable Instruments Law as to suretyship are inadequate and should be entirely omitted. See 59 U. OF PA. L. REV. 542.

CANCELATION OF INSTRUMENTS — INSURANCE POLICY — BREACH OF WARRANTY. — An insured warranted that no company had refused him insurance. He had been rejected by another company, but was ignorant of that fact. Soon after the policy was issued, the insurance company brought a bill to have it canceled, offering to return the premiums. *Held*, that the company is entitled to the relief. *Pacific Mutual Life Ins. Co. v. Glaser*, 150 S. W. 549 (Mo.).

Although the court admitted that the breach of warranty rendered the policy invalid, it granted the relief only on the ground that there was a mutual mistake of fact. But those mistakes which the parties expressly provide for are not the kind that equity relieves against. Mistake in itself is a ground for equity jurisdiction only when the plaintiff has become bound by a contract under circumstances which make it inequitable for the other party to enforce it. But in the principal case he has not become bound at all. See 2 *POMEROY, EQUITABLE JURISPRUDENCE*, § 852. *Cf.* 23 HARV. L. REV. 623. The real reason for cancellation in such a case depends upon the equitable doctrine of *quia timet*. A party whose defense depends upon parol evidence should not be subjected to the danger of future vexation by suit upon a written instrument, particularly a specialty, *prima facie* valid. *Connecticut Mutual Life Ins. Co. v. Home Ins. Co.*, 17 Blatchf. (U. S.) 142; *Cooper v. Joel*, 27 Beav. 313. See *Merritt v. Ehrman*, 116 Ala. 278, 288, 22 So. 514, 516. *Cf.* *Fenn v. Craig*, 3 Y. & C. Exch. 216. Although insurance warranties are conditions precedent in substance, they are conditions subsequent in form and their breach must be proved affirmatively. *Chambers v. Northwestern Mutual Life Ins. Co.*, 64 Minn. 495, 67 N. W. 367; *O'Connell v. Supreme Conclave Knights of Damon*, 102 Ga. 143, 28 S. E. 282.

CARRIERS — CUSTODY AND CONTROL OF GOODS — WHEN CARRIER BECOMES A WAREHOUSEMAN. — The plaintiff shipped goods over the defendant railroad consigned to his own order, the purchaser to be notified. The purchaser refused to accept the goods but the carrier failed to notify the plaintiff thereof. The goods were stored and accidentally destroyed by fire. *Held*, that the carrier is liable. *Nashville, Chattanooga & St. Louis Ry. Co. v. Dreyfuss-Weil Co.*, 150 S. W. 321 (Ky.).

There are several views as to when a carrier's absolute liability ceases and becomes a liability only to use due care. In some jurisdictions it ceases when the carrier deposits the goods at their destination. *Thomas v. Boston & Providence R. Corp.*, 51 Mass. 472; *Merchants' Dispatch Transportation Co. v. Hallock*, 64 Ill. 284. A more scientific view is that a reasonable time for removal must be given. *Wood v. Crocker*, 18 Wis. 345; *Burr v. Adams Express Co.*, 71 N. J. L. 263, 58 Atl. 609. It seems well settled, however, that after the consignee refuses the goods, the carrier is liable to the consignor only as warehouseman for due care. *Hathorn v. Ely*, 28 N. Y. 78; *Stapleton v. Grand Trunk Ry. Co.*, 133 Mich. 187, 94 N. W. 739. Therefore the carrier should not be liable for a loss occurring after failure to notify the consignor of this refusal unless the failure to do so is negligence causing that loss. *Kremer v. Southern Express Co.*, 6 Cold. (Tenn.) 356; *American Sugar-Refining Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383. *Contra*, *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430. In the principal case, however, the court, treating the purchaser as consignee, seems to consider that the liability as carrier continues until the consignor is notified. It is submitted that this reasoning is unsound. The same result could properly have been reached by holding the carrier under a duty to use due care in notifying the consignor, a breach of which duty constituted negligence. *American Sugar-Refining Co. v. McGhee*, *supra*.

CARRIERS — STATE REGULATION — CONSTITUTIONALITY OF STATUTE PROVIDING REDUCED RATES FOR MILITIA. — A statute provided that the militia while traveling under orders should be carried at less than the regular maximum passenger fare. The rate was admitted by the carrier to be compensatory. *Held*, that the statute is constitutional. *State v. Chicago, Milwaukee, & St. Paul Ry. Co.*, 137 N. W. 2 (Minn.). See NOTES, p. 360.

CARRIERS — STATE REGULATION — CONSTITUTIONALITY OF STATUTE REQUIRING POLICEMEN TO BE CARRIED FREE ON TROLLEY CARS. — A statute provided that policemen should be carried free on the cars of street railway companies. *Held*, that the statute is constitutional. *State v. Sutton*, 84 Atl. 1057 (N. J.). See NOTES, p. 360.

CONFLICT OF LAWS — MAKING AND VALIDITY OF CONTRACTS — CONTRACT CONCERNING LAND: WHAT LAW GOVERNS VALIDITY. — A contract made in Minnesota for the sale of Colorado land contained a provision for forfeiture which was invalid by Minnesota law. The Minnesota court applied the local law. *Held*, that this does not deprive the plaintiff of his rights under the United States Constitution. *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69.

For a discussion of the principles involved, see 21 HARV. L. REV. 365; 22 *id.* 534.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LIMITING THE USE TO WHICH PROPERTY MAY BE PUT. — A statute authorized city councils, in their discretion, to prescribe and establish building lines along streets. A city council passed an ordinance that one of its committees should establish a building

line along the side of a street whenever the owners of two-thirds of the abutting property should so request in writing. *Held*, that the ordinance is unconstitutional. *Eubank v. City of Richmond*, 226 U. S. 137, 33 Sup. Ct. 76.

A person can be deprived of property under the Constitution only by proper methods and for a proper purpose. *Cf. Westervelt v. Gregg*, 12 N. Y. 202. See *Davidson v. New Orleans*, 96 U. S. 97, 107. The principal case holds that the ordinance deprives the plaintiff of his property without due process because it allows part of the property owners on a block to determine the extent of the use that other owners shall make of their property. See 1 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 244. A former decision justifies a similar ordinance on the ground that the purpose to be accomplished was a proper subject for the exercise of the police power. *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13. But the principal case properly decides that the use of improper means to deprive a person of his property is alone enough to make the act unconstitutional. This leaves open the question whether the police power may be exercised for æsthetic purposes. When that question arises it is hoped that offenses to the eye will find the same disfavor accorded to offensive noises and odors. *Ex parte Foote*, 70 Ark. 12, 65 S. W. 706; *Slaughter-House Cases*, 16 Wall. (U. S.) 36. See 20 HARV. L. REV. 43.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACTS — CHANGE OF REMEDY INCORPORATED IN THE OBLIGATION. — A statute authorizing materialmen and laborers on public works to sue on contractors' bonds provided that no action should be brought unless the plaintiff served a notice upon the obligors within ninety days after the last item of material or service furnished. This was amended so as to require the notice within ninety days after the completion of the contract and acceptance of the building. A party who furnished materials and service before the change in the law sued on a bond but complied with the amendment only. *Held*, that the amendment does not impair the obligation of the contract contained in the bond. *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 Sup. Ct. 17.

A state may change the remedy on a contract without impairing the obligation. Accordingly it may vary conditions subsequent, such as statutes of limitation, or conditions precedent, such as statutory requirements of notice. *Pleasants v. Rohrer*, 17 Wis. 577; *Curtis v. Whitney*, 13 Wall. (U. S.) 68. Whether the remedy which remains is adequate depends upon the circumstances of each case. *Berry v. Ransdall*, 4 Metc. (Ky.) 292; *Woart v. Winnick*, 3 N. H. 473; *Morris v. Carter*, 46 N. J. L. 260. But see *Read v. Frankfort Bank*, 23 Me. 318, 322. Clearly, a state may prescribe a more efficient remedy. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755. But in the principal case the statute had been construed as though set out in the bond. See *Grant v. Berrisford*, 94 Minn. 45, 49, 101 N. W. 940, 942. It has been held that legislation may invalidate a provision in an insurance policy requiring suit within six months. *Smith v. Northern Neck Mutual Fire Association*, 112 Va. 192, 70 S. E. 482. The principal case goes even further, assuming that the statute was incorporated in the bond, for real conditions subsequent, as in the insurance policy, are enforced less strictly than conditions precedent. *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158; *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 10 Sup. Ct. 1019. By the weight of authority, however, the Constitution protects express stipulations as to remedy. *Central Glass Co. v. Niagara Fire Ins. Co.*, 59 So. 972 (La., 1912); *Billmeyer v. Evans*, 40 Pa. 324; *Taylor v. Stearns*, 18 Gratt. (Va.) 244; *International Building & Loan Association v. Hardy*, 86 Tex. 610, 26 S. W. 497. See *Green v. Biddle*, 8 Wheat. (U. S.) 1, 84. *Cf. The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 147. See BLACK, CONSTITUTIONAL PROHIBITIONS, § 149. Where the parties impose conditions upon

the enforcement of a contract, they thereby directly qualify their promises, so that any change in the conditions obviously impairs the obligation. Of course if a contract specifies a remedy, such as distress for rent, which depends upon a particular legal process, the state is not precluded from abolishing the process. *Conkey v. Hart*, 14 N. Y. 22; *Worsham v. Stevens*, 66 Tex. 89, 17 S. W. 404. Such a stipulation is not thereby impaired, for it was either conditioned upon the continuance of the process, or invalid on grounds of policy. Cf. *Railroad Co. v. Hecht*, 95 U. S. 168. In the principal case the state court could not mean that the statute was incorporated into the contract in fact, and there is no reason to give to a fictitious incorporation the effect of a real condition precedent.

CONSTITUTIONAL LAW. — PRIVILEGES, IMMUNITIES, AND CLASS LEGISLATION — REGULATION OF TRADES: STATUTE PROHIBITING DISCRIMINATION BETWEEN DIFFERENT COMMUNITIES TO INJURE COMPETITORS. — A statute made it a crime for a producer, manufacturer, or distributor of any commodity in general use to sell in one community at a lower price than in another for the purpose of destroying the competition of an established dealer or those intending to become such. *Held*, that the statute is constitutional. *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66.

The common law recognizes that there is a strong social interest in preserving competition, and hence discourages acts or contracts which unreasonably stifle competition. *King v. Waddington*, 1 East 143; *Alger v. Thacher*, 19 Pick. (Mass.) 51. A statute which makes criminal the practice of selling a commodity in one community at a lower price than is charged in another for the purpose of destroying competition, undoubtedly limits the freedom to contract. But so long as the restraints are not arbitrary and are in the interests of society, such a limitation may be justified. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633. It is generally agreed that the social interest in preserving competition does justify such a statute as that in the principal case. *State v. Drayton*, 82 Neb. 254, 117 N. W. 768; *In re Opinion of the Justices*, 99 N. E. 294 (Mass.). Nor does such a statute deny equal protection of the laws merely because limited in its application to those selling in two places in the state. This classification is reasonable because this class of dealers is able to cause harm to the community beyond the power of ordinary storekeepers. Statutes equally limited in their application have been held constitutional. Thus a statute relating only to insurance companies has been held valid. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 26 Sup. Ct. 66. So, too, a law was upheld which applied only to those engaged in the sale of kerosene. *State ex rel. Young v. Standard Oil Co.*, 111 Minn. 85, 126 N. W. 527. See 26 HARV. L. REV. 32 *et seq.*

CONTRIBUTORY NEGLIGENCE — "LAST CLEAR CHANCE" DOCTRINE. — The plaintiff, while lying drunk on a street car track, was injured by a car belonging to the defendant. The lower court charged that, even though the plaintiff was negligent, if he was drunk and helpless and the motorman could, by the use of due care, have avoided the accident, the plaintiff might recover. *Held*, that the charge is erroneous. *Craig v. Augusta-Aiken Ry. Co.*, 76 S. E. 21 (S. C.).

The principal case seems to disregard the "last clear chance" doctrine which is now almost universally recognized. It is generally true that a plaintiff whose negligence contributed as a legal cause of his injury is precluded from recovery. *Neal v. Gillett*, 23 Conn. 437; *Payne v. Chicago & Alton R. Co.*, 129 Mo. 405, 31 S. W. 885. That severe rule, however, has been modified in several instances. Thus where a negligent

plaintiff has been damaged intentionally by the defendant, he can recover. *Steinmetz v. Kelly*, 72 Ind. 442. Also where the defendant observes the danger and proceeds with wanton disregard of consequences the damaged plaintiff is compensated. *Aiken v. Holyoke R. Co.*, 184 Mass. 269, 68 N. E. 238. And thus where the plaintiff, although negligent, is helpless to avoid the accident, and the defendant by the use of due care could avoid it, a recovery is allowed. *Nashua Iron and Steel Co. v. Worcester & Nashua R. Co.*, 62 N. H. 159. See *Nieboer v. Detroit Electric Ry. Co.*, 128 Mich. 486, 491, 87 N. W. 626, 628. As both would be liable to an injured third party, it is apparent that the "last clear chance" doctrine cannot be supported on the ground that the plaintiff's negligence was not a legal cause of the accident. It is in fact an arbitrary modification of a harsh rule; which is justified because in the great majority of cases it places the loss on the man who is most to blame. The now discredited rule of comparative negligence may have been more scientific, but the "last clear chance" doctrine is far easier of practical application, and does not lodge such unlimited power in the hands of the jury.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — STOCKHOLDERS' RIGHT TO RECOVER DIVIDENDS INFORMALLY DECLARED. — The stockholders of a corporation, who included the directors, met and unanimously but without formal resolution agreed to a division of profits. Accordingly, credits were placed on the books to each of the stockholders, some of whom withdrew their share. Subsequently, the corporation became bankrupt. Held, that a stockholder has a provable claim for the amount credited him. *Spencer v. Lowe*, 198 Fed. 961 (C. C. A., Eighth Circ.).

After a dividend is properly declared and set aside, the stockholder may claim it against creditors of the corporation. *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. (N. Y.) 657; *Matter of Le Blanc*, 14 Hun (N. Y.) 8. If it is not segregated, he has a provable claim as a creditor. *McLaran v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 93 S. W. 819. See *Hunt v. O'Shea*, 69 N. H. 600, 601, 45 Atl. 480. Where the power to declare dividends is vested in the directors, the stockholders perhaps cannot act. See *Grant v. Ross*, 100 Ky. 44, 48, 37 S. W. 263. But where all directors attend the meeting in which dividends are declared, and assent, this objection seems unavailable. See 2 MACHEN, CORPORATIONS, § 1191. But cf. *Gashwiler v. Willis*, 33 Cal. 11. The question then is as to the formality necessary to a proper declaration of dividends. Under statutes making directors liable for declaring illegal dividends, a distribution of profits is held a dividend. *Rorke v. Thomas*, 56 N. Y. 559; *Pennsylvania Iron Works Co. v. MacKenzie*, 190 Mass. 61, 76 N. E. 228. Where the rights of no third party are involved, and unanimous consent is given, informality of declaration does not prevent the stockholder from recovering a dividend. *Central of Georgia R. Co. v. Central Trust Co.*, 135 Ga. 472, 69 S. E. 708; *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N. W. 752; *Breslin v. Fries-Breslin Co.*, 70 N. J. L. 274, 58 Atl. 313. But cf. *Dennis v. Joslin Manufacturing Co.*, 19 R. I. 666, 36 Atl. 129. In the principal case, the court considers the trustee in bankruptcy as standing no better than the corporation. Moreover, the other stockholders had collected their dividends. Though informal, these cannot be recovered back. *Berryman v. Bankers' Life Ins. Co.*, 117 N. Y. App. Div. 730, 102 N. Y. Supp. 695. Consequently, to disallow the claim would be to enforce a preferential dividend. Cf. *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542.

CRIMINAL LAW — STATUTORY OFFENSES — DIVISIBILITY OF OFFENSE: PRACTICE OF MEDICINE WITHOUT LICENSE. — A statute prohibited the practice of medicine without a certificate. The defendant, without such certificate, opened an office as doctor and treated two patients on the same day and five

others on different days. *Held*, that the defendant is guilty of eight separate offenses. *State v. Colner*, 127 Pac. 1 (Kan.).

The distinction adopted in the principal case between continuing and divisible offenses depends on whether successive impulses are separately given. See 1 WHARTON, CRIMINAL LAW, 10 ed., § 27. That a series of mining operations, including several changes of workers and separate cuts, has been considered a single offense, suggests the inadequacy of the proposed criterion. *Regina v. Bleasdale*, 2 C. & K. 765. A distinction might more properly be based on whether the gravamen of the injury to the state lies in the accumulated total or in the successive elements. Thus the state may object to the desecration of the Sabbath and punish the carrying on of business without regard to the number of individual transactions. *Crepps v. Durden*, 2 Cowp. 640. Or the public health may be endangered by every piece of bad meat offered for sale, and each exposure, though all on the same counter, may be punished separately. *In re Hartley*, 31 L. J. Rep. N. S. 232. In the principal case both views are possible, either that the state regards each individual treatment as dangerous, or that the legislature merely seeks supervision of the practice of medicine, without assuming that every unlicensed practitioner is necessarily inefficient. The latter seems to be indicated, however, by the peculiar wording of the statute. Thus the including of the mere use of a doctor's sign in the definition of the practice condemned seems to show that the status is punished as such.

ELECTIONS — RIGHT TO APPEAR ON BALLOT UNDER PARTY NAME. — Certain persons nominated for presidential electors at the state Republican primary accepted nominations for the same office from the Progressive party, and announced their intention of voting for the nominee of that party for President. The Republican State Committee, which was authorized by statute to fill vacancies on the ballot, nominated other men to take their places and asked a writ of mandamus to compel the secretary of state to certify these men as the nominees of the Republican party. *Held*, that the writ should be granted, since, the nominees having accepted an inconsistent office, their first position on the ballot is vacant. *State ex rel. Nebraska Republican State Central Committee v. Wait*, 138 N. W. 159 (Neb.). See NOTES, p. 351.

EQUITY — JURISDICTION — INJUNCTION BY MUNICIPAL CORPORATION OF PUBLIC NUISANCE. — The city of Pittsburgh obtained an injunction against the defendants' holding a meeting and making incendiary speeches in the street. Such meetings had formerly resulted in blocking the streets, disturbances, and breaches of the peace when the police tried to break them up. *Held*, that the injunction be dissolved. *City of Pittsburgh v. Van Essen*, 60 Pittsb. Leg. J. 711 (Pa., Allegheny Co. C. P., Oct., 1912).

A public nuisance may be enjoined at the suit of the proper public officer on behalf of the public, under such circumstances as would give a court of equity jurisdiction over a private nuisance. *People v. City of St. Louis*, 10 Ill. 351; *District Attorney v. Lynn & Boston R. Co.*, 16 Gray (Mass.) 242. A private person may obtain an injunction only if he shows special injury to his property or his substantial rights. *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184; *Frink v. Lawrence*, 20 Conn. 117. A municipal corporation may have equitable relief on the same terms. *Borough of Stamford v. Stamford Horse R. Co.*, 56 Conn. 381; *Inhabitants of Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63. But it is not such a representative of the state that it may sue instead of the attorney-general on behalf of the public, unless so provided by statute. *Township of Belleville v. City of Orange*, 70 N. J. Eq. 244, 62 Atl. 331; *Inhabitants of Needham v. New York & N. E. R. Co.*, 152 Mass. 61, 25 N. E. 20. In the principal case, therefore, the fact that no proprietary interest is shown is a sufficient ground for refusing the injunction. *State v. Ehrlick*, 65 W. Va.

700, 64 S. E. 935. Apart from this, the mere fact that the act committed is a crime would not defeat equity's jurisdiction. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Jones v. Van Winkle Gin and Machine Works*, 131 Ga. 336, 62 S. E. 236. Nor would the fact that the plaintiff has the right to use force by its executive powers preclude an injunction if irreparable loss would follow from the use of force. *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. An injunction in such a case as is presented in the facts would probably be peculiarly effective. In general, however, courts of equity should be extremely reluctant to assume the functions of other branches of the government.

ESTOPPEL — ESTOPPEL IN PAIS — FAILURE TO ACT. — The defendant's name was forged to a telegram purporting to make a contract with the plaintiff. On learning of this, the defendant stated to the plaintiff that he would neither admit nor deny liability on the contract. *Held*, that, even assuming a duty to speak, the defendant is not here estopped to deny the contract, because there was no resultant injury to the plaintiff. *Wiggin v. Browning*, 23 Ont. Wkly. Rep. 128 (Divisional Ct.). See NOTES, p. 349.

EVIDENCE — DECLARATIONS CONCERNING MATTERS OF PUBLIC OR GENERAL INTEREST — PRIVATE BOUNDARIES: ADMISSIBILITY OF DECLARATIONS AS PROOF. — In an action of ejectment the rights of the parties depended on a disputed boundary line. The plaintiff offered evidence of what a person, since deceased, who had lived on the land, had said with reference to the location of the line. It did not appear that the declarant had any particular duty or interest in acquiring such information. *Held*, that the evidence is inadmissible. *Smith v. Stanley*, 75 S. E. 742 (Va.).

At common law the recognized public or general interest exception to the hearsay rule admitted, to prove boundaries, only declarations as to matters of general reputation in regard to public boundaries. *Queen v. Bliss*, 7 A. & E. 550; *Hull v. Mayo*, 97 Mass. 416. In some American jurisdictions the courts have made a twofold extension of the exception by admitting hearsay evidence as to private boundaries of particular facts known or acts done by the declarant himself, on the grounds of the necessary lack of other evidence in the early history of American communities. *Martin v. Folger*, 15 Cal. 275; *Harriman v. Brown*, 8 Leigh (Va.) 697. It has been suggested that the American rule is traceable to the older English rule in regard to private prescription. See 13 HARV. L. REV. 56. The fact that the declarant is in effect an unsworn witness testifying of his own knowledge has led to several clearly defined limitations. The declarant must be dead and have had no motive to misrepresent. *Scarfe v. Western North Carolina Land Co.*, 90 Fed. 238. See *Barrett v. Kelly*, 131 Ala. 378, 384, 30 So. 824, 826. The rule of *ante litem motam* also applies. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884. See 15 HARV. L. REV. 673. The further limitation of the principal case that the declarant must stand in reference to the land so as to have made it his duty or interest to obtain accurate information seems also a reasonable qualification. *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500.

FIXTURES — TRADE FIXTURES — WHAT FIXTURES ARE REMOVABLE. — The defendant removed from the front of a store leased from the plaintiff plate-glass windows and marble trimmings which he had attached by screws. The California Code allows removal of a fixture if it "can be effected without injury to the premises, unless the thing has . . . become an integral part of the premises." *Held*, that the plaintiff may recover. *Alden v. Mayfield*, 127 Pac. 44 (Cal.).

At common law the primary test of removal of fixtures by a tenant is whether the tenant's intention in installing them is that they are to be permanent or merely for his use while in possession. *Thompson Scenic Ry. Co. v. Young*, 90 Md. 278, 44 Atl. 1024; *Menger v. Ward*, 28 S. W. 821 (Tex.). But the law, wishing to protect the value of property, will not allow removal where it will injure the realty. *Friedlander v. Ryder*, 30 Neb. 783, 47 N. W. 83; *Pond & Hasey Co. v. O'Connor*, 70 Mich. 266, 73 N. W. 159. The California code is in effect declaratory of this view of the common law. How the change will affect the fixture is not generally considered in this country if it does not entirely destroy it. *Van Ness v. Pacard*, 2 Pet. (U. S.) 137; *Baker v. McClurg*, 198 Ill. 28, 64 N. E. 701. Inasmuch as the intention of the tenant in every case would seem to be to remove whatever is of any value to him, it seems that the first requirement for removability should be only his intention that the property be used for trade purposes. Just as the law requires that the realty be not injured, so it seems that a further requirement of severability should be that the fixture retain a removable identity. *Whitehead v. Bennett*, 27 L. J. Ch. 474; *Collamore v. Gillis*, 149 Mass. 578, 22 N. E. 46. This rule more often than any other would preserve property for the benefit of society consistently with justice to the parties. An attempt to determine the value to society in each case would be obviously impracticable. Ornamental fixtures are governed by similar rules. See *Hayford v. Wentworth*, 97 Me. 347, 353, 54 Atl. 940, 942.

GARNISHMENT — PERSONS SUBJECT TO GARNISHMENT — INSURANCE COMPANIES: DISTINCTION BETWEEN INDEMNITY INSURANCE AND INSURANCE AGAINST LIABILITY. — A policy insuring the defendant against loss from the operation of his automobile provided that no action should lie against the company to recover for any loss unless brought by the assured for loss actually paid in money by him after trial of the issue. The plaintiff obtained a verdict against the assured in a suit defended by the insurance company for damages for injuries caused by the defendant's automobile. The plaintiff then sought to garnish the proceeds of the policy in the company's hands. Held, that he can do so. *Patterson v. Adan*, 138 N. W. 281 (Minn.).

Cases on garnishment make a decisive distinction between contracts of indemnity against loss and contracts insuring against liability. *Finley v. United States Casualty Co.*, 113 Tenn. 592, 598, 83 S. W. 2, 3; *Stephens v. Pennsylvania Casualty Co.*, 135 Mich. 189, 193, 97 N. W. 686, 688. In the former, garnishment is impossible, because of the general statutory rule that contingent liabilities are not subject to garnishment. *Grimsrud v. Linley*, 109 Wis. 632, 634, 85 N. W. 410, 411. In the latter, garnishment is allowed, as the indebtedness is absolute. *Hoven v. Employers' Liability Assurance Corporation*, 93 Wis. 201, 67 N. W. 46. The question, then, is purely one of classification, and in many cases is not difficult. *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353; *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, 56 Pac. 1096. The majority of the cases have held policies like that in the principal case to be contracts of indemnity. *Allen v. Aetna Life Ins. Co.*, 145 Fed. 881; *Frye v. Bath Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395. *Contra*, *Sanders v. Frankfort Marine, etc. Ins. Co.*, 72 N. H. 485, 57 Atl. 655. Cf. *Blackstone v. Alemannia Fire Ins. Co.*, 56 N. Y. 104; *In re Eddystone Marine Ins. Co.*, [1892] 2 Ch. 423. In the principal case there are many provisions which already insure against liability, and the proviso in terms applies to some of these. In such a case of ambiguity it would seem that the intention of the parties would be best carried out by construing the policy against the insurer. See *Kratzenstein v. Western Assurance Co.*, 116 N. Y. 54, 59, 22 N. E. 221, 223. This is the more reasonable since the proviso seems to be directed at the fraudulent payment by the insured of pretended claims, and can be made effective by confining it to cases where the company has not conducted the

defense. *Contra, Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Cushman v. Carbondale Fuel Co.*, 122 Ia. 656, 98 N. W. 509.

ILLEGAL CONTRACTS — CONTRACTS COLLATERALLY RELATED TO SOMETHING ILLEGAL OR IMMORAL — RECOVERY OF PROCEEDS OF ILLEGAL TRANSACTION IN HANDS OF AGENT. — The plaintiff sent goods to the defendant, his agent, with an illegal gambling device by which the goods were to be sold. It was agreed that the proceeds should be kept separate and remitted to the plaintiff, and that title in all the property should remain in the plaintiff. *Held*, that the plaintiff can recover the proceeds of the illegal sales. *Yale Jewelry Co. v. Joyner*, 75 S. E. 993 (N. C.).

The law will not aid in enforcing an illegal contract. Therefore the defendant in the principal case cannot be forced to perform his contractual obligation to remit the proceeds. *Snell v. Dwight*, 120 Mass. 9. If the illegal transaction were completed and the proceeds handed to an agent who did not participate in the transaction, the agent could not set up the illegality of the former transaction because the obligation to pay over to the principal would arise solely from the receipt of the proceeds. *Daniels v. Barry*, 22 Ind. 207; *Wilson v. Owen*, 30 Mich. 474. Many courts have held that where an agency or partnership is for the purpose of carrying out an illegal transaction the principal or partner cannot recover the proceeds, because the relation, being inseparable from the illegal contract, is itself illegal. *Lemon v. Grosskopf*, 22 Wis. 447; *Leonard v. Poole*, 114 N. Y. 371. The opposing view is that there is a duty arising from the fiduciary relation quite disconnected from the completed illegal transaction. *Truant v. Elliott*, 1 B. & P. 3; *Baldwin v. Potter*, 46 Vt. 402. See *Woodworth v. Bennett*, 43 N. Y. 273, 276. But this view would be hard to support if the transaction were a serious crime. If the title to goods and proceeds, however, is always in the principal, the plaintiff need rest his claim neither on contractual nor relational obligation, and it would not seem that the existence of illegality is ever a ground for allowing third parties to deprive the plaintiff of property, as distinguished from contract, rights.

INJUNCTIONS — ACTS RESTRAINED — RESTRAINING SUIT IN A FOREIGN JURISDICTION. — The defendant brought suit in an Iowa court against the plaintiff for slander and malicious prosecution, and while that action was still pending the defendant sued the plaintiff on the same cause of action in Missouri and attached land of the plaintiff in that state. A preliminary injunction restraining the prosecution of the Missouri suit was granted, whereupon the defendant, after causing the Iowa suit to be dismissed, moved that the injunction be dissolved. *Held*, that the motion should be granted. *Jones v. Hughes*, 137 N. W. 1023 (Ia.). See NOTES, p. 347.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — DISTRIBUTION OF RECOVERY UNDER EMPLOYERS' LIABILITY ACT. — A brakeman was killed through the negligence of the railroad while engaged in interstate commerce. A state statute specifying the persons entitled to recover damages in such a case conflicted with the federal Employers' Liability Act. *Held*, that the federal act governs. *St. Louis, San Francisco, & Texas Ry. Co. v. Geer*, 149 S. W. 1178 (Tex., Ct. Civ. App.).

For a criticism of a recent contrary decision, see 25 HARV. L. REV. 565. For a general discussion on the constitutionality of the federal act, see 25 HARV. L. REV. 548.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — EMPLOYEES PROTECTED BY FEDERAL EMPLOYERS' LIABILITY ACT. — A brakeman was injured

while employed upon an intrastate train which was transporting water to a tank supplying interstate and intrastate trains. *Held*, that the federal Employers' Liability Act does not apply. *Missouri, Kansas, & Texas Ry. Co. v. Fesmire*, 150 S. W. 201 (Tex., Ct. Civ. App.).

A railroad employee was injured while repairing a bridge upon which a track to carry interstate commerce was to be laid. *Held*, that the federal Employers' Liability Act does not apply. *Pedersen v. Delaware, Lackawanna, & Western R. Co.*, 197 Fed. 537 (C. C. A., Third Circ.).

A railroad employee was injured while unloading rails to be used in replacing old rails upon a roadbed over which interstate trains passed. Apparently he was to take part in the repairing. *Held*, that the federal Employers' Liability Act does not apply. *Pierson v. New York, Susquehanna & Western R. Co.*, 85 Atl. 233 (N. J., Ct. Err. and App.). See NOTES, p. 354.

INTERSTATE COMMERCE — CONTROL BY STATES — TAXATION: GOODS IN TRANSIT. — Flour while in interstate transit was stopped *en route* in an intermediate state, and there repacked and blended. The flour was usually on the wharf for from ten to twenty days, and a "fair working margin" was always kept on hand. *Held*, that it is taxable by the state. *In re Holt & Co.*, 35 N. J. L. J. 307 (State Board of Equalization of Taxes). See NOTES, p. 358.

JUDGMENTS — COLLATERAL ATTACK — MERGER OF FOREIGN JUDGMENT. — The plaintiff, after obtaining a judgment in Washington based on a Massachusetts judgment, brought suit in California on the Massachusetts judgment. *Held*, that the action is maintainable. *Lilly-Brackett Co. v. Sonnemann*, 126 Pac. 483 (Cal.).

The defendant in the principal case contended that the Massachusetts judgment had been merged in the Washington judgment. A lien is usually created by statute on the lands of a judgment debtor within the jurisdiction. *Mitchell v. Wood*, 47 Miss. 231. See *Hutcheson v. Grubbs*, 80 Va. 251, 254. It is argued, therefore, that unless successive judgments merge, a judgment creditor can unjustly subject the judgment debtor's property to a multiplicity of record liens. See *Gould v. Hayden*, 63 Ind. 443, 448; 1 FREEMAN, JUDGMENTS, 4 ed., § 216. Accordingly some courts hold that where the second judgment is recovered in the same jurisdiction and gives a lien upon the same property as the first, the former judgment is merged. *Denegre v. Haun*, 13 Ia. 240; *Purdy v. Doyle*, 1 Paige (N. Y.) 557. *Contra*, *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Preston v. Perton*, Cro. Eliz. 817. Of the few cases, however, where the second judgment has been obtained in a different jurisdiction, the majority support the principal case. *Weeks v. Pearson*, 5 N. H. 324; *Wells v. Schuster-Hax National Bank*, 23 Colo. 534, 48 Pac. 809. *Contra*, *Gould v. Hayden*, 63 Ind. 443. The courts argue that judgments are equal securities, and that where securities are equal there is no merger. But the meaning of this arbitrary distinction is not clear. It would seem that the technical doctrine of merger should not be applied where it will work injustice. To fully realize on his judgment, a judgment creditor may need to proceed against the judgment debtor's property in more than one jurisdiction, and it would be unjust to hold that in order to acquire a lien upon lands of the judgment debtor in a second state he must lose his judgment lien in the first jurisdiction.

LARCENY — LARCENY BY TRICK — DISTINCTION BETWEEN LARCENY BY TRICK AND FALSE PRETENSES. — The defendant was indicted for grand larceny upon two counts. The first alleged that the defendant *animo furandi*, by means of false representations, obtained a sale of goods to his principal and a delivery to himself as agent. The second charged the commission of common-

law larceny. *Held*, that, since the facts alleged constitute common-law larceny by trick and not an obtaining by false pretenses, the first count is bad and the second is good. *People v. Feinman*, 137 N. Y. Supp. 933 (Ct. Gen. Sess., N. Y. County).

In New York the crime of larceny has been extended by statute to cover the old statutory crime of obtaining by false pretenses. N. Y. CONSOL. LAWS, 1909, § 1290, p. 3963. But it is unfortunately held that an allegation of common-law larceny is not supported by proof of an obtaining by false pretenses, and *vice versa*. It is thus still essential to decide whether certain facts constitute larceny by trick or an obtaining by false pretenses. *People v. Dumar*, 106 N. Y. 502, 13 N. E. 325; *People v. Gottschalk*, 66 Hun (N. Y.) 64, 20 N. Y. Supp. 777. The court in the principal cases chooses larceny by trick, on the ground that at common law where actual title passes to the defendant there is an obtaining by false pretenses, and where possession or any interest less than ownership passes we have larceny by trick. But at common law it was not essential, in order to prevent the crime from being larceny by trick, that title should actually pass, nor even that the owner should intend it to pass to the person who obtained the property. *Queen v. Adams*, 1 Den. C. C. 38; *Rex v. Adams*, R. & R. 225. *Cf. Zink v. People*, 77 N. Y. 114. The necessary element was that the owner should intend to deal with the title. *Regina v. Thompson*, 9 Cox C. C. 222. It would seem, therefore, that, if this arbitrary distinction is to be preserved, the court should have upheld the count alleging an obtaining by false pretenses.

LICENSES — REVOCATION AFTER LICENSEE HAS ACTED ON PAROL LICENSE AND INCURRED EXPENSE. — The defendant contracted orally to give the plaintiff rights in common in a well and windmill to be erected on the defendant's land at their mutual expense. After the work was completed the defendant refused to allow the plaintiff to draw water. *Held*, that the license implied is revocable, but that an injunction will issue against obstructing the plaintiff if he is not paid within a reasonable time the value of the work done by him. *Johnson v. Bartron*, 137 N. W. 1092 (N. D.).

By the weight of authority equity will enforce performance of a parol contract to give an easement in behalf of a party who has performed his part to his detriment. *Gilmore v. Armstrong*, 48 Neb. 92, 66 N. W. 998; *McManus v. Cooke*, 35 Ch. D. 681. See 49 L. R. A. 497, 513. But this exception to the Statute of Frauds is, by many courts, not extended to the enforcement of parol licenses. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Simpson v. Wright*, 21 Ill. App. 67. See *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 933, 934; 9 HARV. L. REV. 455. The court in the principal case, following this view, admits a legal right to revoke but restrains its exercise if the plaintiff is not indemnified. This jurisdiction of equity must be based on the vague doctrine that equity will restrain the unconscionable exercise of a legal right. An example is the equity of redemption in mortgages. *Emanuel College v. Evans*, 1 Rep. Ch. 18. See 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 162; 13 HARV. L. REV. 676. So also equity will compel a creditor to deliver a security to a surety who has paid the debt, instead of to the debtor. *St. Peter's Catholic Church v. Vannote*, 66 N. J. Eq. 78, 56 Atl. 1037. It will often enjoin the enforcement of penalties in contracts. *Giles v. Austin*, 62 N. Y. 486. See 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 433. It will restrain the unconscionable exercise of the legal rights incident to incorporation. *Beal v. Chase*, 31 Mich. 490. See *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 211, 6 So. 41, 43. The principal case may be a novel extension of this doctrine, but when the expense has been incurred by the plaintiff for a benefit to the land as desired by the defendant, such a decree would seem to be a logical, just, and practical solution of a difficult problem.

MARITIME LIENS — MATERIALMAN'S LIEN — WHAT LAW GOVERNS. — A Russian ship was mortgaged in England. Later she proceeded to Copenhagen and was supplied with necessities for which by Danish law the materialman acquired a maritime lien on the ship, good against all prior interests therein. The ship was libeled and sold in Scotland. By Scotch law a mortgage took precedence over the claim of a materialman. *Held*, that the law of the forum be applied and the English mortgagee preferred to the Danish materialman. *Constant v. Klompus*, 50 Scot. L. Rep. 27. See NOTES, p. 356.

MASTER AND SERVANT — WORKMEN'S COMPENSATION ACTS — RECOVERY FOR INJURY AGAINST THIRD PARTY: RIGHT TO SUBSEQUENT RECOVERY AGAINST EMPLOYER. — The plaintiff, an employee of the defendant, while acting in the course and scope of his employment, was injured by the negligence of a third party. He sued the third party and recovered, giving a release of his claim against him. The plaintiff then sued his employer under the Workmen's Compensation Act of the state. *Held*, that the plaintiff can recover. *Perlburg v. Muller*, 35 N. J. L. J. 299 (N. J. C. P., 1912).

The right of the injured employee against his employer seems contractual in nature. The employer has undertaken to indemnify the employee for injuries arising out of the employment. His obligations, therefore, in case of accident, seem closely analogous to those of an insurer. A provision of the English act which has been substantially followed in many states subrogates the employer to the injured employee's right of action against a negligent third party. STAT. 6 EDW. VII, c. 58, § 6; KAN., SESS. LAWS, 1911, c. 218, § 5; ILL., LAWS, 1911, p. 324, § 17. Without such a statutory provision, on analogy to insurance probably subrogation should not be allowed. It is true that subrogation is permitted in fire insurance. *Mason v. Sainsbury*, 3 Dougl. 61. But no case of subrogation in life insurance can be found. The probable reason is that courts regard the contract as not for indemnity but to pay a fixed sum on the happening of an event. See *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, 619. But see MAY, INSURANCE, 4 ed., § 7. Even treating life insurance contracts as valued indemnity policies, the pecuniary damage done by death is so purely conjectural that perhaps under no circumstances can we say the insured is fully indemnified. In accident insurance the pecuniary damage to the insured can frequently be more readily determined, but the same reasoning, although with less force, applies. In accident insurance there seems to be no case of subrogation, and it has been held affirmatively that subrogation will not be allowed. *Ætna Life Ins. Co. v. Parker*, 96 Tex. 287, 72 S. W. 168. Since the employer cannot interpose a set-off, a complete recovery is justified in the principal case.

MECHANICS' LIENS — RIGHT TO ENFORCE LIEN AGAINST LESSOR. — A lessee contracted in his lease to build upon the leased premises. The lessor was not to be chargeable for the lessee's contracts, but on termination of the lease the improvements were to belong to him. The lease being forfeited, an action to enforce a mechanic's lien was brought against the lessor. *Held*, that the lien will not bind the lessor. *Weathers v. Cox*, 76 S. E. 7 (N. C.).

Under various statutes a mechanic's lien clearly binds the lessee's interests. *Dutro v. Wilson*, 4 Oh. St. 101; *Cornell v. Barney*, 94 N. Y. 394. In general, however, it should not bind a lessor's estate unless by express consent he has actually connected himself with the building contract. *Francis v. Sayles*, 101 Mass. 435; *Roth v. Bellingrath*, 71 Ala. 55. The lessor's consent cannot ordinarily be inferred by estoppel, or from the relation of landlord and tenant. *Mills v. Matthews*, 7 Md. 315; *Conant v. Brackett*, 112 Mass. 18. Nor can consent be inferred from a lease providing for repairs or improvements by the

lessee, even if the lessor is ultimately to reimburse him therefor. *Conant v. Brackett*, *supra*; *Rothe v. Bellingrath*, *supra*. A *fortiori* there is no consent in the principal case, since the lessor expressly denies the lessee the use of his credit. Some decisions hold the lien runs against the lessor, relying on the express wording of their state statutes. *Carey-Lombard Lumber Co. v. Jones*, 187 Ill. 203, 58 N. E. 347; *Burkitt v. Harper*, 79 N. Y. 273. Others obtain this result by incorrectly inferring a fictitious agreement between lessor and lessee and construing an improvement lease as a building contract. *Hall v. Parker*, 94 Pa. St. 109; *Kremer v. Walton*, 11 Wash. 120.

PRESUMPTIONS — EXISTENCE AND EFFECT OF PRESUMPTIONS IN PARTICULAR CASES — DEATH AFTER SEVEN YEARS. — In 1873 the intestate's sister, thirty-four years of age, disappeared from the house where she had been a domestic servant for ten years, leaving behind all her personal effects, and was not heard of thereafter. In 1910 the intestate died, leaving property to a part of which the sister would be entitled if living. The other heirs claimed the whole estate. *Held*, that the death of the sister is not established. *In re Benjamin*, 137 N. Y. Supp. 758 (Surr. Ct., N. Y. Co.).

Conclusive presumptions are rules, not of evidence, but of law. But presumptions, when legitimately applied, are presumptions of fact and leave the matters assumed open to further proof. The burden of going ahead is merely shifted to the other party. *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108. See *Hoyt v. Newbold*, 45 N. J. L. 219, 222. In general a person is presumed to be alive until after such time as he would die of old age. See *Hammond's Lessee v. Indoes*, 4 Md. 138, 174; *Hopfensach v. City of New York*, 173 N. Y. 321, 324, 66 N. E. 11, 12. By judicial legislation, a series of cases, following the analogy of two seventeenth-century statutes, created an arbitrary presumption of death after seven years' absence. *Doe v. Jesson*, 6 East 80; *Hopewell v. De Pinna*, 2 Campb. 113. See *Burr v. Sims*, 4 Whart. (Pa.) 150, 170. In many jurisdictions continuous unexplained absence for seven years without tidings will raise the presumption of fact in spite of other circumstances surrounding the disappearance. *Wentworth v. Wentworth*, 71 Me. 72. See *Schaub v. Griffin*, 84 Md. 557, 563, 36 Atl. 443. Under such a rule the principal case would undoubtedly be wrong. But it is submitted that additional circumstances, such as youth, health, or a roving disposition, should in certain cases prevent the creation of the presumption. Thus, the presumption, which is convenient in many cases, will not necessarily cause injustice if the adverse party has no rebutting evidence. *Czech v. Bean*, 35 N. Y. Misc. 729, 72 N. Y. Supp. 402; *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195. In the principal case, the circumstances surrounding the disappearance hardly seem to furnish grounds to deny the ordinary presumption.

PROHIBITION — WHETHER A WRIT OF RIGHT. — The petitioner, being threatened by an unconstitutional tribunal, demanded a writ of prohibition. On refusal, a petition to establish exceptions was brought. *Held*, that the petition will be allowed. *Curtis v. Cornish*, 84 Atl. 799 (Me.).

The principal case seeks to rely on the principle laid down by the United States Supreme Court that a writ of prohibition issues of right in the absence of other means of redress, and at discretion where there is another legal remedy. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570; *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453. But the application seems doubtful, since *certiorari* or a writ of error would be available, though probably inadequate, alternative remedies. Many American courts treat the writ as wholly discretionary and hence not reviewable on appeal. *State ex rel. Osborn v. Houston*, 35 La. Ann. 538; *People ex rel. Adams v. Westbrook*, 89 N. Y. 152. In England the remedy ordinarily

issues of right. *Farquharson v. Morgan*, [1894] 1 Q. B. 552; *Worthington v. Jeffries*, L. R. 10 C. P. 239, 280; *Chambers v. Green*, L. R. 20 Eq. 552, 555. Logically prohibition is the exact counterpart of mandamus. See *Thomas v. Mead*, 36 Mo. 232, 247. The latter is invoked to compel exercise of jurisdiction by an inferior court; the former, to prohibit a threatened usurpation or abuse of jurisdiction. In *the Matter of Turner*, 5 Oh. 542; *Connecticut River R. Co. v. County Commissioners of Franklin*, 127 Mass. 50. Mandamus, like prohibition, originated as a royal prerogative issuing at the discretion of the king in the exercise of his police powers. See *Awdley v. Joy*, Poph. 176; *King v. Barker*, 1 W. Bl. 351; 3 Bl. Comm. 111. The obvious repugnance of this conception to our form of government has led the majority of American courts to treat mandamus as issuing of right, and hence as subject to review. *Hartman v. Greenhow*, 102 U. S. 672; *Gilman v. Bassett*, 33 Conn. 298. By applying the same reasoning to prohibition, the writ should issue of right, even when as in the principal case an inadequate legal remedy is also available.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — COMBINATION OF COMPETING RAILROADS. — The Union Pacific Railroad Company bought a controlling interest in the stock of the Southern Pacific Company. The two railroads did a large amount of competitive business, though such business was but a small part of all the traffic carried by them. Held, that the transaction constitutes a combination in restraint of trade under the Sherman Anti-Trust Law. *United States v. Union Pacific R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53.

The Standard Oil case, holding that only undue restraints of trade are forbidden by the Sherman Anti-Trust Law, intimated that that combination might have been lawful had it not been for the unfair methods used in crushing competitors. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502. See 25 HARV. L. REV. 31. Before that decision a combination of competing railroads was clearly regarded as within the act. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25; *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436. The merger of competing railroads was considered inimical to the public welfare because of their public nature and practical monopoly. See *Northern Securities Co. v. United States*, 193 U. S. 197, 363, 24 Sup. Ct. 436, 467; *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 697, 698, 16 Sup. Ct. 714, 722. The principal case affirms the principle that the suppression of outside competitors is not essential to constitute undue restraint of trade in such a case, whatever may be the rule in regard to industrial combinations. See 25 HARV. L. REV. 71. The case further holds that even though the competitive business constitutes but a small portion of the total business transacted, if its amount is considerable the entire combination is illegal. The result shows, also, consistently with the "rule of reason" adopted in the Standard Oil case, that the form of the transaction producing the undue restraint is immaterial. *United States v. American Tobacco Co.*, 221 U. S. 106, 31 Sup. Ct. 632. Conceding the undue restraint, the purchase by one company of a controlling interest in the stock of a competitor is a "combination" within the act. *United States v. Terminal R. Association of St. Louis*, 224 U. S. 383, 32 Sup. Ct. 507.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — CONTROL OF COAL MARKET BY CONTRACTS TO PURCHASE OUTPUT OF COMPETITORS. — The six defendant carriers controlled the means of transportation from the district in which is located all the anthracite coal of the country. The proposed building of a new railroad into the district was defeated by the carriers' taking the stock in a new company formed by them to purchase the coal property from

which the new road expected to carry coal to the market. This purchase, with the already large holdings of the carriers, gave them control over seventy-five per cent of the annual output and ninety per cent of the unmined coal lands. By agreement the carriers individually contracted to purchase the annual output of independent coal operators, securing to the carriers in perpetuity one-half the tonnage of the independent operators. *Held*, that the purchase of the coal property and the contracts with the independent operators are in violation of the Sherman Anti-Trust Law. *United States v. Reading Company*, 226 U. S. 324, 33 Sup. Ct. 90.

Combinations by loose agreement, as where competitors agree not to bid against each other or to fix selling prices, have long been held offensive to the Sherman Anti-Trust Act. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96; *Swift v. United States*, 196 U. S. 375, 25 Sup. Ct. 276. Consolidations of competing carriers are held within the act; and also consolidations by any class of competitors interfering with outside competitors. See discussion of *United States v. Union Pacific R. Co.*, *supra*. This latter principle would seem to cover the purchase of the coal property in the principal case. But the contracts to purchase the output of the independent operators did not interfere with any outside competitors, nor did they limit competition between the contracting railroads. And they partake rather of the nature of consolidation than of agreements to refrain from competition, for some of the advantages that flow from centralized management are present. These contracts if upheld, however, would give the defendants a dominating control over the anthracite coal business which would be dangerous to the public welfare, since the defendants would be free from the check of potential competition. The Supreme Court in an analogous case held illegal a consolidation by which all the available terminal facilities were acquired, though in that case there was the added fact of an arbitrary use of the control acquired. *United States v. Terminal R. Association of St. Louis*, 224 U. S. 383, 32 Sup. Ct. 507. It does not necessarily follow from these holdings that the elimination of any existing competition when new competitors may possibly arise is illegal.

SUBROGATION — RIGHTS OF ONE FORCED TO PAY DEBT AGAINST THE REAL DEBTOR. — The cashier of a bank, without authority, allowed the defendant to overdraw her account. Upon discovery of the shortage he gave the bank his note for the amount. He became bankrupt, and the bank established its claim against the assets. The assignee then sued the defendant for the full amount of the overdraft. *Held*, that the assignee is subrogated to the rights of the bank and can recover and retain the full amount of the overdraft. *Mentz's Assignee v. Mahoney*, 150 S. W. 503 (Ky.).

Subrogation is simply a method of preventing unjust enrichment. See 26 HARV. L. REV. 261. But in a proper case it may be denied on the ground that one who seeks subrogation must have clean hands. *Hays' Estate*, 159 Pa. 381, 28 Atl. 158; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406. Thus where the plaintiff makes his wrong against the defendant the basis of his claim, or where his misconduct is dangerous to the public, he may be barred. *Guckenheimer v. Angevine*, 81 N. Y. 394; *Ramsay's Estate v. Whitbeck*, 183 Ill. 550, 56 N. E. 322. Cf. *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161. Whatever the limits of the doctrine may be, in the principal case the wrong is atoned for, and does not seem to be so closely connected with the recovery of the overdraft as to defeat the action. Subrogation should always be permitted when, as in the principal case, it will prevent unjust enrichment, and the plaintiff is entitled in equity to relief. *In re McBride*, 19 N. B. R. 452; *Rees v. Eames*, 20 Ill. 282. See *Huff v. Hatch*, 2 Disn. (Ohio) 63, 67. *Contra*, *Doyle v. Glenn*, 4 Humph. (Tenn.) 309. But the court goes too far in saying that the plaintiff, after recovery, can retain the full amount of the over-

draft. An equitable doctrine should never be allowed to work inequitably. Therefore the plaintiff should be required to hold in trust for the bank the money in excess of the sum that he has paid to the bank. *Cf. Jordan v. Adams*, 7 Ark. 348; *Kendrick v. Forney*, 22 Gratt. (Va.) 748. To cases where an assignment or novation can be spelled out this reasoning is of course inapplicable. The principal case should be carefully distinguished from cases where the defendant, though at fault, has not been unjustly enriched. *German Bank v. United States*, 148 U. S. 573, 13 Sup. Ct. 702.

TAXATION — PARTICULAR FORMS OF TAXATION — INHERITANCE TAX PAID IN TWO STATES. — A testator, domiciled in Illinois, left personal property in California. After probate of the will in Illinois, an administrator with the will annexed was appointed by a California court, which approved his payment of legacies and California inheritance taxes on all the property in California, and ordered him to turn over the residuum of the property to the Illinois residuary trustee named in the will. This having been done, the question then arose in Illinois whether it would be giving full faith to the proceedings in California if the trustee were required to pay the Illinois inheritance tax. *Held*, that the tax might be imposed only on legacies paid out by him. *People v. Union Trust Co.*, 99 N. E. 377 (Ill.).

By the overwhelming weight of authority, an inheritance tax is not one on the property affected, but on the privilege of succeeding to the inheritance. *In re Macky's Estate*, 46 Col. 79, 102 Pac. 1075; *In re Stone's Estate*, 132 Ia. 136, 109 N. W. 455. *Contra, Estate of Cope*, 191 Pa. St. 1. It is not a property tax even though made a lien on property, or though the statute on its face levies a tax on property. *State ex rel. Schwartz v. Ferris*, 53 Oh. St. 314, 41 N. E. 579; *Gelsthorpe v. Furnell*, 20 Mont. 299. The reason ordinarily assigned is that the privilege of acquiring property by will or by succession is a right created and regulated by the state. *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594. But see *Nunnemacher v. State*, 129 Wis. 190, 198, 108 N. W. 627, 628. It follows that the legislature may impose burdens in the form of taxes on this privilege unrestricted by the constitutional provisions relating to the taxation of property as such. *In re Fox's Estate*, 154 Mich. 5, 117 N. W. 558; *Booth's Executor v. Commonwealth*, 130 Ky. 111, 113 S. W. 61. So also the tax may be imposed on the transfer of securities which as property are not in themselves within the taxing power of the state, as, for example, United States bonds or exempted state and municipal bonds. *Succession of Levy*, 115 La. 377, 39 So. 37; *Succession of Kohn*, 115 La. 71, 38 So. 898. If the tax had been on the property itself, the approved administration in California would have precluded any further inheritance tax in Illinois. But being regarded as a tax on the legatees resulting in a debt due to the state, the matter did not fall within the purview of the first administration.

TROVER AND CONVERSION — WHO MAY SUE — BAILEE AT WILL FOR CONVERSION OCCURRING AFTER LOSS OF POSSESSION. — A watch was stolen from the plaintiff, a bailee at will, and pawned with the defendant, who refused to give it up on demand by the plaintiff. After the theft but before the demand and refusal the bailor at will terminated the bailment. *Held*, that the plaintiff has no cause of action. *Landry v. Mandelstam*, 84 Atl. 642 (Me.).

Bare possession, even adverse, at the time of the conversion, is sufficient to support an action of trover. *Vining v. Baker*, 53 Me. 544; *McAvoy v. Medina*, 11 Allen (Mass.) 548. See *Buckley v. Gross*, 3 B. & S. 566, 574. But in the principal case the plaintiff must depend on some right to possession when the watch was refused. A finder, having a title good against all the world but

the original owner, probably retains a right of possession sufficient to maintain trover for a conversion even after he loses the article. See *Buckley v. Gross*, 32 L. J. Q. B. 129, 131; SALMOND, TORTS, 2 ed., 320, 321. But see CLERK & LINDSELL, TORTS, 270. Perhaps it would also be expedient to give an adverse possessor similar rights. But cf. *Buckley v. Gross*, 32 L. J. Q. B. 129, 131. The expiration of a fixed term of bailment, however, or an express notice of the termination of a bailment at will, even where the article has been lost, would seem to terminate the right of possession of the bailee. A right of adverse possession, being in its essence contrary to the intention of the owner from the start, could hardly be cut off by a mere expression of intention. But a rightful bailee who has lost possession of the bailed article could not after his term set up an adverse right without actual possession.

WILLS — CONSTRUCTION — ESTATES BY IMPLICATION. — A will directed the executrix to sell the testator's land and to purchase bonds with the proceeds, the interest from the bonds to be applied to the maintenance of the testator's children. *Held*, that legal title to the land vests in the executrix. *In re Hazelton*, 137 N. Y. Supp. 937 (Surr. Ct., Kings County).

Legal title to land may pass under a will by an implied devise where it is necessary that the executors should have a legal estate for the most efficient performance of the duties placed upon them by the will. See 1 WILLIAMS, EXECUTORS, 10 ed., 489. Thus where executors are directed to pay an annuity out of land, legal title to the land passes to them by implication. *Oates v. Cooke*, 3 Burr. 1684; *Anthony v. Rees*, 2 Cromp. & J. 75. The same is true where the executors are instructed to collect and pay over rents. *In re Fisher*, L. R. 13 Ir. 546; *Morse v. Morse*, 85 N. Y. 53. A devise in such a case is not implied, however, if it will offend some rule of law. *Post v. Hover*, 33 N. Y. 593. Where a will provides that the executors shall sell land, they take merely a power of sale, since a power is sufficient to enable them fully to perform that duty. *Doe v. Shotter*, 8 A. & E. 905. See 1 SUGDEN, POWERS, 7 ed., 129-131. There seems no reason why the result should be different when, as here, the executors are instructed to invest the proceeds of the sale. *Greenough v. Welles*, 10 Cush. (Mass.) 571; *Hope v. Johnson*, 2 Yerg. (Tenn.) 123.

WILLS — REVOCATION OF CODICIL BY TEARING — DISPOSITION OF REVOKED LEGACY. — In a codicil to a will in which the defendants were residuary legatees, the testatrix bequeathed a sum of money to a legatee not mentioned in the will. Later she destroyed the codicil with no intention of thereby revoking the will. *Held*, that the legacy contained in the destroyed codicil should not go to the heirs-at-law but should become part of the residuary estate. *Osburn v. Rochester Trust & Safe Deposit Co.*, 152 N. Y. App. Div. 235.

Although for many purposes a codicil may republish a will, it clearly does not so incorporate the will into itself that a destruction of the codicil destroys both the will and the codicil. See *Estate of McCauley*, 138 Cal. 432, 434, 71 Pac. 512, 513; *Appeal of Carl*, 106 Pa. St. 635, 641. And since a will and its codicils are construed in law as one instrument the destruction of a codicil would seem to present a situation similar to the cancelation of a single clause of a will in jurisdictions allowing partial revocation by physical act. But what disposition to make of a specific legacy after a non-testamentary revocation thereof is a mooted point. Some courts urge that to allow the legacy to become part of the residuum would in substance be effecting a different testamentary disposition without the formalities required by statute. *Miles's Appeal*, 68 Conn. 237, 36 Atl. 39. Cf. *Wahn's Estate*, 156 Pa. St. 194, 27 Atl. 59; *Creswell v. Cheslyn*, 2 Eden 123. But the better reasoned cases reach the opposite result. *Bigelow v. Gillott*, 123 Mass. 102; *Collard v. Collard*, 67 Atl.

190 (N. J. Eq.). The testator's intent at the time of drafting the residuary clause was to bequeath by it not any particular property, but whatever property might for any reason be undisposed of at his death. The fact that the residuum will be increased by his own subsequent acts which are not for that exclusive purpose, can furnish no reason for refusing to give effect to his intent. *Stubbs v. Sargon*. 3 Myl. & C. 507. For such a principle would prevent the devising of all after-acquired property.

BOOK REVIEWS.

COMPARATIVE LEGAL PHILOSOPHY. Applied to Legal Institutions. By Luigi Miraglia. Translated by John Lisle. The Modern Legal Philosophy Series, Vol. III. Boston: Boston Book Co. 1912. pp. xl, 793.

This volume is intended as an historical introduction to the various schools of continental legal philosophy, but it is only fair to the author to state that he himself, in the last Italian edition, entitled it simply *Philosophy of Law*. For the book is not either a history of legal philosophy, nor a *systematic* survey of the diverse influential views that have been entertained on the chief topics of legal philosophy. It is simply a book on the philosophy of law, unusually full of references and summaries of the views of different writers; but it cannot be claimed that Miraglia displays a keen sense for the historical or the systematically important. There are, for instance, very few references to the main stream of European legal thought that begins in patristic literature and culminates in Suarez or Calvin (neither of whom are even mentioned); and in giving the modern views of corporations six pages are devoted to Giorgi but not a word is said about Gierke! The reader who wants to see for himself how typical these instances are, need only glance through the index and note the relative frequency with which different writers are quoted. As Italian thought, however, is not as well known in America as it ought to be, it is the reviewer's duty to point out that the same historical disproportion characterizes Miraglia's references to Italian writers. Thus Rosmini, who is quoted so frequently, has, in spite of the saintliness of his character and the prodigious bulk of his writings, hardly had any more influence on Italian thought than Gioberti who is barely mentioned, or even than Count Mamiani, the protagonist of the national Italian School of Philosophy, who is not mentioned at all.¹

The volume before us consists of three distinct parts: the Introduction (pp. 1-86), Book I (pp. 87-318), and Book II (pp. 319-773). The number of pages in each section fairly represents the relative importance of the subject matter as treated by Miraglia.

The introduction attempts a summary of the history of philosophy; but it is the reviewer's unpleasant duty, as a teacher of philosophy, to state bluntly that Professor Miraglia's knowledge of the history of general philosophy is not worthy of serious respect. It is obviously acquired at second hand, and, — apart from the absence of the historical sense, which shows itself in giving Spedalieri as much space as Hobbes and Locke combined, — is full of positive misinformation (see, *e. g.*, his references to Duns Scotus, p. 11, Cabanas [Cabanis?], p. 37, or neo-criticism, pp. 85-86). The layman in philosophy will do well to omit this introduction altogether, and depend for his knowledge of the his-

¹ One of Count Mamiani's books, on the Law of Nations, was translated into English by Lord Acton.

tory of general philosophy either on the ordinary text-books on the subject, or on Berolzheimer's scholarly and remarkably clear book in this series.

Book I deals, in the main, with the ground covered by Korkunov's book in this series, namely, the general theory of law. It is not unfair to add that Miraglia compares as unfavorably with Korkunov in point of clear incisive thinking, as he does with Berolzheimer in point of historical perception. The book reads very much like a student's note-book, full of short abstract summaries of the views of different philosophers, which interrupt rather than continue the author's argument. Obviously much learning is not always conducive to clear thinking. A curious instance of Miraglia's undigested learning occurs when, under the influence of Spencer, he tells us dogmatically (p. 200), "it seems indubitable that the first forms of law must have been the most simple and abstract, that is, the least complicated," but on page 208, under the influence of Maine, he tells us that of early law an "extraordinarily large part" is "devoted to procedure," which "presupposes private law, public law, and penal law and is, therefore, the most complex" (p. 206).

A great many good things are said, in spots, about general philosophy, and some good things about law, but there is no coherent doctrine or real bridge between the two; for Miraglia has no clear standpoint of his own, — as, indeed, Mr. Kocourek, in his able and generous introduction, is forced to admit. Vico, Hegel, Rosmini, and Spencer are inextricably confused.

A good deal of suggestive material occurs, especially in chapters 8 and 9, which give the relation of law to morals, social science, economics, and politics. While law must not be confused with morals, the two cannot be separated. "It is not true that law takes no account of intent, because it considers it in contracts, wills, constitutions, and crimes. Law does not consider the intent except as it is shown by the act, and does not contemplate it of itself as morals do" (p. 248). As legal rules are principles of social action it is not possible to work out a reasonable system of law without sociology (p. 264); at the same time no sociology can be satisfactory, unless it takes into account the considerations with which philosophy of law concerns itself. Similarly the just proportion between conflicting economic claims is to be adjusted by the science of politics, but as this can be done only in the light of a sound philosophy of law, the latter, it would seem, must be regarded as an integral part of the former.

Book II, entitled *Private Law*, aims to extend philosophical thought to various legal institutions, mainly the law of property. Private law, according to Miraglia, must include five categories, namely, the law of property, personality, obligation, family, and inheritance. The distinctive trait of private law, we are told, is that "it has essentially to do with rights of a financial value" (p. 202). On the other hand we are also assured that "there are ethico-juridical relations which have nothing to do with wealth, interest, and utility as objects, and which cannot be given a material valuation" (p. 284). As marital and certain personal relations are obviously of the latter kind, Miraglia should, in consistency, have excluded them from the realm of private law. Of distinctly philosophical or systematic disadvantage is Miraglia's exclusion of civil procedure from the realm of private law; for the distinction between different legal conceptions is frequently indiscernible except in the light of the different procedures which they entail. Similar objection may be made to the view which classifies the conflict of laws as private international law.

When confronted with the relatively hard and concrete facts of legal institutions, Miraglia's cloudy eclecticism is forced into some definiteness. The scoffer may object that there is, in this portion of the volume, more of sociology and jurisprudence than of philosophy; but this in no way detracts from its extreme usefulness. After all, if an American philosophy of law is ever to be worked out it will, in all probability, be not by deduction from what are gener-

ally known as philosophical principles, but rather by reflection on such vexed problems as freedom of contract, the personality of corporations, etc. For this reason, this book on Private Law, forming by itself a respectable volume of over 450 pages, is one of the most useful portions of the whole series. Miraglia's handling of the subject of "inherent" rights is based on a somewhat antiquated individualistic or atomistic philosophy, and his treatment of the problem of the family is based on what is now recognized as inadequate anthropologic information; but the essential problems, from which a satisfactory philosophy of law must begin, are stated in a way to compel the thoughtful reader to further reflection. May the book find many such readers!

The translation seems to have been carefully made. The use of the word *consideration*, however, as the equivalent of *causa* in the continental law of contract, is open to objection. In a way this inaccuracy is rather useful, for it tends to break down the widespread fallacy that there is nothing in continental law corresponding to the common-law doctrine of consideration — a fallacy repeated by such a careful writer as Markby. The fact, however, remains that the continental doctrine of *causa civilis* is in its origin and its functioning not the same as *consideration*. A brief note by the editorial committee might have cleared the matter up for the unwary reader.

As the aim of the series is to put the American student in touch with the best continental literature on the subject, one can justly complain that this volume is not sufficiently edited. Miraglia quotes or refers to many authors without mentioning the names of the books involved, and when the latter are mentioned no reference is made to page or chapter. Thus on p. 121 we are informed of a certain interesting view of Kerbaker, but we are not referred to any particular work. Surely the American reader cannot be presumed to be familiar with Kerbaker, an Italian philologist! As the last Italian edition of Miraglia's book is now a decade old, a few references to more recent literature, e. g., the mere mention of Saleilles' *La Personnalité Juridique*, at the end of the chapter on artificial persons, would have been very helpful, and would have brought the book a little more up to date.

There is an elaborate but somewhat mechanically constructed index. The compiler of it does not seem, for instance, to be aware of the identity of St. Thomas and Aquinas, but makes different entries under these separate headings.

With all its faults this book is heartily recommended as a mine from which the patient and critical student may extract a vast deal of information and suggestion. It is to be hoped that the student's task may be made easier soon in a second edition.

M. R. C.

THE ORIGIN OF THE ENGLISH CONSTITUTION. By George Burton Adams. New Haven: Yale University Press. London: Henry Frowde, Oxford University Press. 1912. pp. xii, 378.

The thesis of this book, which is an amplification, with important additions, of Professor Adams's earlier articles, is that the principle of the English constitution, that there is a body of law above the king, was derived directly from feudalism, and "that it was the work of the Great Charter of 1215 to transfer it from that system then falling into decline to the newer governmental system just beginning to be formed" (p. 167). The feudal principle enforced by Magna Carta, limiting the authority of the king, Professor Adams finds in the fact of contract. The feudal contract bound both parties, the sovereign as well as the humblest vassal. In Chapter V, which is new, he examines at considerable length the clauses of the Charter and concludes that it is essentially a document of feudal law, pledging the king to respect feudal rights, which

he was already bound to observe, and in clause 61 setting up a definite machinery to enforce his obedience.

The tone of the book is confident, and generally unqualified in spite of the reservation in the note to page 169 and in the concession in a brief clause on page 185 that there were other contributing causes to our constitutional principle of limited monarchy. We think the author has placed too much emphasis on the feudal theory of its origin. Professor Adams concedes (p. 210) that nearly half the clauses in the charter are wholly or in part of non-feudal origin; and as to some others we should dispute his classification of them as feudal. For instance, the famous clause 39 he interprets narrowly to cover only cases in which the barons themselves were concerned. We should prefer a more extensive construction of *liber homo*. Before the Statute of *Quia Emptores*, 1290, there was no direct feudal relation between the king and tenants not tenants in chief. Is the feudal contract (feudal relation would be a better term), then, to account for the limitations that the king puts upon himself in respect of every freeman or subject, as he does in clauses 20, 23, 28, 30-33, 35, and elsewhere, especially in the numerous judicial provisions? How then is Magna Carta "a statement of feudal law"? (p. 169 note). As is also pointed out in that note feudalism furnished in a very slight degree "the body of law by which the king was finally bound." Is it not reasonable then to suppose that there were other influences besides feudalism which had an important bearing on this great principle of constitutional law?

And such other influences are to be found, not only in Anglo-Saxon and Anglo-Norman times, but as part of the conception of royalty in the Frankish Kingdom. Alfred in a sense recognized the old law as binding on him when he told us that he durst not venture to set down much of his own, but collects the dooms of his forefathers.¹ Ethelred ordained that every man should be regarded as entitled to right.² The custom of the Norman kings to declare in force the old laws³ shows the thought that there is a law which the king should observe. Moreover, it has been pointed out that in form at least the king was doing what he and his predecessors had done in the case of the borough. William the Conqueror ordained that the burgesses of London be worthy of all the laws that they were worthy of in the time of King Edward.⁴ And in the time of the Frankish kings royalty, even when strongest, was below public and private law.⁵ Feudalism was not responsible for these checks on absolutism. Professor Adams would style these "moral limitations of the customary law," which down to Henry I's charter were binding only on the king's conscience. Henry's charter was the first effort to transform them into definite, legally binding limitations. But it was a failure except as a model for the future. Magna Carta, he goes on to say, differed widely from these earlier ideas not only in its principle of feudal contract, only crudely stated in Henry's document, but in the clear recognition of a sanction (clause 61) which legalized insurrection as a last resort to compel the king to obey the law. Upon clause 61 Professor Adams lays great emphasis as giving an institutional or legal character to the king's obligation to observe the law (p. 177-184, 247-248, 275 *et seq.*). We must note, however, that a law may be a law without a sanction, that legalized rebellion is a curious kind of a sanction, and finally that the clause came to nothing.

¹ 1 Thorpe, *Ancient Laws and Institutes*, p. 59.

² *Ibid.* p. 305.

³ *Statutes of William I*, § 7, Stubbs, *Charters*, p. 84; *Charter of Henry I*, §§ 1, 9, 13, *ibid.* pp. 100, 101.

⁴ 1 Pollock and Maitland, *English Law*, 2 ed., 673-674; *Charter of Liberties of Henry I*, by H. L. Cannon, 15 *Am. Hist. Rev.* 37, 45.

⁵ 2 Brunner, *Deutsche Rechtsgeschichte*, § 60.

We agree with Professor Adams that the principle of the feudal relation may be one of the causes which resulted in a constitutional check on the king. We cannot agree that it is the prevailing cause upon which great emphasis should be laid. No doubt it accounted in great measure for the limitations which John placed upon himself with respect of his tenants in chief. But there are other reasons of weight at least equal to that of feudalism to be regarded in accounting for the checks to his absolutism with respect of all his subjects.

After all, he who is seeking for the precise origin in history of such a great constitutional principle as the supremacy of the law and who declares that here and now he has found its sole source has an uphill road to travel to reach the summit of proof.

J. W.

THE EYRE OF KENT, 6 & 7 EDWARD II, 1313-14. Volume II; being Volume VII of the Year Book Series of the Selden Society and Volume XXVII of its Proceedings. Edited by William Craddock Bolland. London: Bernard Quaritch. 1912. pp. li, 264.

This is one of the best and most illuminating of the year-book series, and in saying this the wonderful volumes of Professor Maitland are not forgotten. Mr. Bolland has more than fulfilled the promise of his first volume. In his introduction to this volume he has given us an explanation of bills in eyre (p. xxi) and of the authorship of the year-books (p. xxxi), which are as brilliant as some of Maitland's best work. After an investigation which has involved a study of other manuscript materials, Mr. Bolland has proved that the bills in eyre were the simple and untechnical complaints of poor suitors to the judges in eyre, written by the common scribes of the time, and accepted by the court without regard to technical form or learning in the law. As to the authorship of the year-books, Mr. Bolland appears to have established his important conjecture that the books were issued as a commercial venture, being copied from notes taken in court by briefless barristers who were paid by the publishers. He even gives good reason for suspecting that the manuscripts which have survived are the "remainders" of the edition which, being unsold, were not subjected to the wear and tear of daily use.

Mr. Bolland has included a corrected copy with translation of a treatise of mediæval French orthography first published by Mr. Thomas Wright. The cases included in the year-book are of unusual interest and value. The Selden Society is to be congratulated upon one of its most valuable volumes.

J. H. B.

A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES. By Clement L. Bouvé. Washington, D. C.: John Byrne and Company. 1912. pp. xxvi, 915.

THE TREATY-MAKING POWER OF THE UNITED STATES AND THE METHODS OF ITS ENFORCEMENT AS AFFECTING THE POLICE POWERS OF THE STATES. By Charles H. Burr. Reprinted from Proceedings of the American Philosophical Society for 1912. Vol. LI. pp. 269-422.

THE NEW CUSHING'S MANUAL OF PARLIAMENTARY LAW AND PRACTICE. Revised and Enlarged. By Charles Kelsey Gaines. New York: Thompson Brown Company. 1912. pp. xv, 263.

IMMIGRATION AND LABOR. The Economic Aspects of European Immigration to the United States. By Isaac A. Hourwich, New York and London: G. P. Putnam's Sons. 1912. pp. xvii, 544.

GESCHICHTE DER QUELLEN UND LITTERATUR DES RÖMISCHEN RECHTS. By Paul Krüger. Leipzig: Duncker and Humblot. 1912. pp. x, 444.

PENAL PHILOSOPHY. By Gabriel Tarde. Translated by Rapelje Howell. Preface by Edward Lindsey. Introduction by Robert H. Gault. Boston: Little, Brown, and Company. 1912. pp. xxxii, 581.

AMERICAN PURE FOOD AND DRUG LAWS. By James Westervelt. Kansas City, Mo.: Vernon Law Book Publishing Company. 1912. pp. x, 1535.

HARVARD LAW REVIEW.

VOL. XXVI.

MARCH, 1913.

No. 5.

THE VOCATION OF AMERICA FOR THE SCIENCE OF ROMAN LAW.¹

I

WHEN a German professor of Roman law discusses his subject in America in an attempt to further a *rapprochement* of the jurisprudence of this country and that of his native land he may well be in doubt whether this can be achieved. At first sight, an immense chasm seems to yawn between the legal ideas of the United States and of its juristic mother country, England, on the one side, and the romanized legal ideas of continental Europe on the other side, so that from a juristic point of view the Channel seems broader than the ocean. True, the common law of England and of North America, even in its period of development in England, did not remain unaffected by Roman law; but this influence never had the same force in England and America that it had on the continent of Europe, especially in Germany. Recently, I concede, this state of things appears to have changed. In Germany, especially, the compilation of law made by Justinian lost its force as a statute book on the first of January, 1900, so that now, with some unimportant exceptions, it has no more binding force for German tribunals than it has always had in

¹ The first part of the following article is similar in substance to the introductory lecture delivered by Professor Leonhard, when Kaiser Wilhelm Professor of Roman Law at Columbia University in 1907-1908.

American administration of justice. In spite of this, the legal situation of the two countries has by no means become the same by this change. A new difference grew up in that Germany has now a civil code, the contents of which were shaped to a great extent by the doctrines of the science of Roman law. Therefore German lawyers feel obliged to look at Roman law from a special point of view in order to explain their code with the aid of its Roman sources. On the contrary, America has no such code, with the exception of the code of Louisiana; nor do American lawyers require such a point of view to explain their law. In consequence, one might argue that at present the opportunities for collaboration of the two countries in expounding Roman texts have decreased rather than increased.

In spite of this, I venture to assert that the Roman texts remain an important bond between America and Germany. Whether you accept such an assertion depends wholly upon the view taken as to the connection between law and national character. This relation is often overrated by the opponents of the study of Roman law and is often over-emphasized; not, indeed, without noteworthy consequences.

Above all it must not be overlooked that there are two distinct purposes with which the study of Roman law may be pursued. The one is to study critically models of the best application of legal rules. The other is to enable us better to understand the present-day law so far as it is influenced by Roman texts.

All decisions which have corresponded to the needs of their time are to be regarded as models of juristic technique; that is, as models of the art of applying the law. It is indifferent whether the legal system built up by them still obtains or whether we approve it. The so-called classical Roman law, which was brutal toward prisoners, slaves, and gladiators, trifling in matters of concubinage, indecent in its rewards for begetting children, and harsh to the poor, perhaps does not meet the approval of a just critic holding the modern point of view. Nevertheless the jurists who applied this legal system were classical; that is, they were technicians of the first rank in the art of administering a given law. We do not study their art to enable us to imitate their conceptions of law, but only to enable us to apply them in the administration of wholly different rules. It was not the Roman law which was classical, but the Roman lawyers.

It is obvious that American jurists have learned and can yet learn much from Roman models, even as the Germans have done. One may venture to say that the situation in England and America in this respect is more favorable than in Germany, because in common-law countries the Roman codes have never had the force of statutes, and therefore the Roman principles of law may be more easily separated from the art of the lawyers who applied them. In Germany the two things have often been confused, and the admiration rightly due the art of Roman lawyers has unjustly been given to the rules of law, which were only the materials shaped by their art. By way of reaction men went to the other extreme. The overrating of Roman texts gave way to an underrating and a neglect of the fundamental principles of the modern European science of law. It is true that a general theory of method and models thereof may be found elsewhere as well as among the Romans; but among the Romans to a greater extent. The art of profiting by them is no more important for Germany than for America. Therefore it is a mission of every nation to grasp the historical facts necessary for an understanding of the Roman models.

Whether the content of Roman law has a permanent value for America or for Germany is a distinct question, although it is often confused with the foregoing. Opinions differ widely on this point. There are two important general theories. The one is that legal rules or at least legal relations have a cosmopolitan nature; the other teaches that all rules, conceptions, and relations of law have a national character. The first opinion formerly prevailed and was overthrown by the so-called historical school. It was overthrown but not destroyed, for to-day the majority of jurists are hesitating between the two.

The followers of the cosmopolitan theory fall into two main groups: a group of Romanists, and a group of philosophers who intentionally reject the principles of the historical school. The cosmopolitan-Romanist theory teaches that there are certain rules and conceptions of law of general validity which are to be found in every country and at every time, and that by some chance the Roman lawyers had more opportunity than those of other nations to discover these general rules and set them down for all times to come in the form of the so-called "*ratio scripta*." This opinion

is not without a certain foundation. It is undoubtedly true of the technical art of jurisprudence, which often has been confused with the rules and the conceptions of law; and it is also true of certain tendencies common to the different legal systems by which universal human interests are protected. Nevertheless this theory neglects the political differences between nations. Therefore whoever attempts to propagate the German-Romanist teachings in America falls at once under suspicion of adhering to this cosmopolitan theory, of attributing to Roman law the character of an immutable written reason (*ratio scripta*) which it cannot claim.

I must with emphasis protest against this suspicion. Whoever with the practical sense for which English and Americans are especially noted considers the conditions of law in all places and in all times must absolutely dispute their identity. We find, it is true, claims to security which are reiterated almost universally; we find also similar means of securing them at different times and in different places. But the manner in which those who administer the law must appraise these means for satisfying the needs of a people and the extent to which they are employed are everywhere more or less different. There is no unitary reason of law. Therefore there can be no *ratio scripta* of all law. And the non-existent even the Romans could not call into being. He who seeks this pursues a will-o'-the-wisp. The fantastic undertaking to derive such impossible results from the study of Roman legal history, which many have essayed in Germany, cannot be recommended to America. From this point of view the content of Roman law has no value for explaining the legal doctrines of America.

For the philosophical group of cosmopolitan jurists Roman law has even less value, since they would develop universal rules and conceptions of law from the events of life without reference to the past, as the mathematician evolves his theories.

This theory is held by the adherents of the so-called school of equitable interpretation (*Freirechtsschule*). In accordance with this view German and American jurists should strive to achieve a common goal, as, for example, German and American mathematicians do. This goal would be a general theory of law of world-wide validity. Certainly such a theory as this has no relation to Roman law. On the contrary every nation could develop the universally valid law without resort to foreign models. It may

be, indeed, that the followers of such a method would gain some general ideas useful for their purpose from the Roman texts. And since for centuries Germans have devoted a special measure of labor to exposition of the Roman texts, so far as a general, super-national theory of law is to be found in the Roman texts you may well turn to Germany for knowledge thereof. I shall not deny that a general theory of law for all nations may be developed. It must be conceded that there are certain fundamental forms of law which frequently recur even if there is no common content of the legal system for the whole world. Especially there are certain modes of development of law, certain ideas as to the function of judges, and certain qualities of law, which can be found everywhere. But the most important observations of this kind were not made by the Roman lawyers. They are making nowadays more under the influence of modern philosophy² than through the interpretation of the Roman texts. The Roman texts afford but scanty materials on these points.

The result is that from the point of view of cosmopolitan jurisprudence there is little advantage for America in the Roman legal science of Germany.

There are two things especially overlooked by the writers who in place of historical study of law would cultivate a sociological observation of the present. In the first place, the so-called present is nothing more than the last period of a continuous history. Secondly, no sociology can neglect the mightiest of social forces which exist in the traditions and the ideas developed in the past. Before the name "sociology" came into use, there existed for centuries unconscious sociologists, namely, the scholars who treated and applied the history of law.

Let us turn now from the cosmopolitan to the nationalist theory of law which gives to the law before all things a national color. The historical school derived law from the "spirit of a people" (*Volksgeist*). Therefore it has often been taught that in reason no nation can construct its law upon the ideas of another. From this point of view not only the German law, but even the Roman law, must be excluded from the interest of American lawyers. Accordingly it was a tremendous mistake that Germany meddled

² Cf. especially Stammler, *Theorie der Rechtswissenschaft*.

so much with Roman law. This opinion may be heard and read often in Germany to-day. On this theory one would have to say, "America for Americans, not for Romans."

This would be well taken if the relation between the United States and the Roman empire were the same, for instance, as the relation between the United States and China or the United States and Turkey, that is to say, if ancient Rome were indeed an alien country to America from an intellectual point of view. Geographically the Roman people are aliens. Anthropologically there is a different race in Italy than the prevailing races in America. Even with respect to language there is a fundamental difference. But if we look at these two peoples, the Romans and the Americans, with respect to their culture, as representatives of their special civilizations, as individualities in a greater family of human culture, this is not true. This quality of civilization is an essential one for our problem as to the interest of America in Roman law. Relation of blood and descent cannot decide this question, because law is a matter of ideas and of spiritual life, not of physical substance. The gap which yawns between this physical substance and the content of human souls is nowadays often underrated, since we are wont to regard the human mind in altogether too scientific a manner, as a mere complex of functions of the body. Thus regarded, relation of blood seems to be more important for human institutions than identity of thoughts and sentiments. It is not strange, therefore, that with respect to study of the law many scholars would set up an exclusiveness of the Teutonic races as against the rest of the world, since there is a closer connection between the English, the American, and the German peoples, than between either of them and any other. Thus they might be set off as a perfectly defined family. But that is wholly without importance for the domain of law.

As has been mentioned already, the legal tradition of the different nations on the European continent for centuries has had a closer connection with Justinian's law books than has been the case in England or America. Therefore in the larger circle of European culture, to which America also belongs and to which Japan seeks admission, we see two great groups: first, a group strongly influenced by Roman law; and, second, a group less influenced in this way. England and America are in the latter class. Formerly the

opinion prevailed in Germany that the English law was wholly free from Roman ideas. Everyone knows from the excellent works of Sir Frederick Pollock and Professor Maitland that this opinion was long ago refuted. In reality Roman law was received in both groups. But in England this reception was more a reception of ideas, in Germany more a reception of a code. In the former there was a reception only of doctrines or terminologies, on the Continent there was a reception of the totality of the Roman texts. Although they could not be introduced into the jurisdiction without many exceptions, they were introduced into the body of German law as a whole because otherwise they could not be understood. Roman ideas of law invade the whole wide territory for which the Christian church created a common civilization. The great European circle of culture by no means includes the whole of humanity, but it stands as a mighty power between humanity and the single peoples which compose it. Therefore we must not ask whether the character of our law shall be cosmopolitan or national. For there is still a third possibility: it may be European. This does not refer to geographical Europe, but to a community which, developed first in Europe, has acquired a larger territory, overpassing Europe's boundaries and extending throughout the world.

This greater Europe is composed of all nations which depend upon a common intellectual past. From Rome arose the universal empire of antiquity. From that empire arose the universal church of the Middle Ages. From that church arose the invisible commonwealth of civilized nations. This community is not one of law alone, for law never remains uninfluenced by the other branches of culture. But the members of this family of nations are related in the first degree with respect to ideas of law, because, first through the influence of the universal church, and later through the international science of Bologna, Roman and canon law came to be a common fundamental basis of law for the community of civilized peoples. In later times nations have become more and more separated, but the remembrance of the common source of their thinking has kept them from absolute division. Without that a reunion of them through the international intercourse of to-day could scarcely be deemed possible.

In this way certain Roman ideas have been preserved as a com-

mon treasure of law which can be easily recognized by the terminology of juridical science. It was of this common world of thoughts which Savigny spoke when writing of the Roman law of to-day under the title, *Das heutige römische Recht*. He meant thereby fundamental legal ideas of the circle of civilization of greater Europe which it has inherited from antiquity. This may not be said as yet of the whole world, although it almost seems as if the individuality of this favored group would gradually absorb all humanity. If this could happen, the law would become an actual cosmopolitan possession. Until this happens it is and remains national, although not without a mingling of elements belonging to greater Europe. In consequence, the law of each people within this family of nations is a composite of common and of peculiarly national elements.

This is true for America no less than for Germany. For the United States especially is fully conscious of the European character of its culture. It does not refuse its citizenship to the children of Africa; but it does not admit with them any institution which has not a European character — as, for instance, polygamy or human sacrifice. Naturally America also possesses its individual national character and its individual legal institutions; but melted and mingled therein to a very high degree is the world of ideas which is common to European culture, not merely the narrower world of the Anglo-American common law.

If you look at the mixture of national and European ideas, which is to be seen in the different nations, you will find a great difference in the relation between the two elements of law which are mingled therein. As has been said above, the Anglo-American community gave no excessive regard to the traditional Roman material, since it shut itself off in large measure from the general spiritual movement in Europe which was especially influenced by Roman law. On the contrary, for those parts of law which have arisen from modern world-commerce, not from antiquity, especially commercial law, general European ideas have been cultivated by the English race in a very high degree. There is, then, a mixture of three elements in law as in other phenomena of civilization:

- (1) Common ideas of Roman and ecclesiastical origin.
- (2) Ideas peculiarly national.
- (3) Modern common ideas, developed neither by antiquity nor

by single nations, but by the commerce of later times and the connection of scientific life.

To-day the law which may be called "super-national" is by no means purely Roman. A large part has nothing to do with Rome. But the development of our common institutions had its very root in the common ideas of Roman science, which were already spread among civilized nations when this development began.

One must admit that the attitude of Germany toward these ancient foundations of law has changed greatly. Formerly the wisdom of antiquity was admired with an almost slavish devotion and allegiance. Nowadays there are those who go to the opposite extreme. There are moderns who would banish the Roman texts from the materials of juristic education, even as some reformers would exclude the Old Testament from the study of Christian doctrine. Not very long ago the cultivation of Roman law in Germany seemed to be a standard for the world. Germany has rapidly lost this hegemony, since many of her scholars, certainly not working for the best end of their country, have tended to overrate the national element at the expense of the common ideas of European law.

Such a change was the consequence of new purposes, given to Germany by new events, especially by the rise of the German Empire. They have been carried out not unsuccessfully, and they could not have been attained without a strong consciousness of strength and of nationality. But we must hope that the glorious past when Germany led other peoples by developing the common European ideas of civilization will not be forgotten.

We hear on all sides the voices of Romanists who lament that Germany studies only the old Roman and old German law, and that she is beginning to forget the law of the last part of the nineteenth century from which sprang the new code. It is to be feared that the faculty for understanding our own code is beginning to disappear. Demand is made with reason that we restore the science of working over Roman ideas in post-Roman times.³

³ Cf. Leopold Wenger, *Das römische Recht an den deutschen Universitäten*. Paris, Rousseau, 1912 (Mélanges Girard).

This doctrine went wrongly by the name of *Pandekten*. The name was absolutely unsuitable and therefore cannot be recommended for use in America. Formerly a short introduction to Roman law was succeeded by a detailed exposition. The

But if we should restore in Germany the old science of modern Roman law, this task would have no interest for America. For both the name (*Pandekten*) and the thing itself are foreign to you. In Germany, we need a statement of Roman law adapted to the civil code, such as Sohm has already supplied in the newer editions of his excellent textbook (*Institutionen*), the earlier editions of which were translated into English and had a wide circulation in America. But this new form of the elements of Roman law can be of very little interest abroad.

On the whole the theory of Savigny and his successors and the German learning of the Pandects was not put in complete relation with the whole law of the European culture-community. They knew but little of English law, and they knew still less of the influence of Roman law in England. The famous German doctrine of the Pandects was not a European learning, it was only continental.

Nevertheless, there are English and American lawyers who know very well how to use German Pandects even for American purposes. Chief among them is Justice Oliver Wendell Holmes.⁴ But I do not believe that such a difficult task can be undertaken by every one, nor that the regular courses for American practitioners should be burdened by the study of German pandectists, who unhappily are beginning to be neglected even by their compatriots because of the difficulty of fully understanding them. When even in Germany a thorough revision of their works, already falling into neglect, is obviously needed, how could I ask Americans to build a common science of Roman law for both countries upon those impaired foundations?

Such a science must be reserved for the few who are distinguished by extraordinary faculties and extraordinary knowledge. This is the more true since the United States went a different way than Germany from the beginning. At first it was conscious of its

introduction followed Justinian's Pandects. In later times the introduction dealt with the pure Roman law of antiquity and the exposition with the modern Roman law. Lectures on each were divorced from the Roman texts. But in spite of this the old names have remained without any good reason. Indeed, names frequently rest on usage rather than on reason.

The same name is used in France for an absolutely different thing. Cf. P. F. Girard, *Mélanges de Droit Romain*, p. 467 ff. Indeed, the French use of this word is also arbitrary.

⁴ The Common Law, Boston, 1881.

distinction from Europe and felt that its nature was opposed to European peculiarities. But since it has become a great world-power coming into close contact with all European commonwealths and fusing the English element and the other races into one mass, New England has become a New Europe. It is easy to understand, therefore, why the tendency should exist to cultivate the common sources of European civilization following similar purposes on the continent of Europe. The astonishing progress which interest in Roman law has made in America in a very short time, while the subject was coming to be neglected in Germany, is a remarkable phenomenon in the history of civilization. If the movement continues in the same direction in both countries, it may be that in the future America may acquire the leading part in the European science of law which Germany played until recently. Such a result, however, cannot yet be expected, because American law has not the necessary traditions, and Germany, I hope, will regain a better memory of its past before it becomes overburdened with new tasks. Yet one may anticipate that a collaboration of the two nations will come from a sound comprehension of a common interest in study of the same subject. Such a collaboration would require the German Romanists to treat the practical Roman law from another point of view than the one now usual. To-day, since the enactment of the new civil code, a merely historical and philological treatment of Roman law prevails. The "pure Roman law" (*i. e.*, pure in contrast with applied) unadulterated by the ideas of later times seems to be regarded as the true ideal of scientific endeavor; namely, an exposition freed in every respect from the present, and nothing more than a phase of philology and archæology. This tendency has given us excellent works of general value. But the relations of our present law to the Roman law are, more and more, intentionally overlooked or passed over in silence. There is indeed a difference between a pure science and an applied one. The former so-called "science of the Pandects" was of the latter type, as we have seen above. More and more it is losing its practical value for us. Nor can it regain its former glory unless its principal ideas are converted into a common science for the whole civilized world, and no longer confined to the special interests of Germany. Our program must be: To make manifest the value which is to be attributed to Roman texts as a common source of

European civilization, as a source of the internal unity of legal institutions of the greater-European family of peoples.

Such a purpose has a special value beyond exposition of the German civil code by romanist theories of the past. To achieve it, America and Germany have a common mission. In preparation therefor, Germany offers a rich and abundant material from the days of the science of the Pandects. For the pandectists, although neglected nowadays, have not permanently lost their universal value. But America would have a certain advantage in the many-sidedness that results from the coming together of so many different nations of European civilization, and the consequent need of emphasizing those ideas of law and sentiments of right which are common to them all. Moreover, the study of Roman law promises to develop new forces. No doubt it was hard that for centuries Germany should base her jurisprudence upon a body of law written in a foreign tongue and ill-arranged. But this much-abused situation, along with indisputable disadvantages, involved extraordinary advantages, which the adversaries of Roman law are wont to ignore. These difficulties required and in turn exercised mental powers, which would not have been necessary for the understanding of a simple national development of law in the country in question, if such a development had existed. An enormous quantity of historical and philological knowledge, with which a judge working under simple conditions can easily dispense, was imperatively demanded in Germany of every lawyer, from the highest functionary to the lowest. By this circumstance the whole social class of lawyers was elevated above the general unlearned mass. But above all, the ill-arranged compilation of Justinian forced the professor of law to work out a useful systematic form, which has been the quest of centuries. Without this the ambiguities of the Roman books could never have been cleared up, nor the books purged of internal contradictions. There are many who believe that the fundamental ideas of legal systems have been given to mankind by nature or by the grace of God, like the rules of mathematics. In reality they have been won in a hard struggle against a confused mass composed of conflicting human thoughts. In England there was not so hard a struggle, because there was no necessity of handling Justinian's code as a domestic statute. But in return continental science, by arranging the Roman texts,

wrought valuable categories, of which England's jurisprudence also is making fruitful use, and will do so even more, I take it, in the future. From these categories the systems have been constructed without which the continental civil codes would not exist. Finally the lawyers of continental Europe were always obliged to work backward from the present to the past to find the means of performing their office, and in consequence were continually forced to make a comparison which in Germany is usually called "intertemporal." In this way they gained the art of surveying centuries in a bird's-eye view.

Translation of such results of continental jurisprudence into the sphere of English and American lawyers, which has been done already by many excellent minds, makes for the juridical *rapprochement* of the nations of the greater European family. From such a *rapprochement* proceeds the tendency towards a law of the world,⁵ at least towards a science of law to be cultivated by the world.⁶ In the endeavor to bring about such a *rapprochement* of legal science we must compare not merely the rules of law in different countries, but the whole legal development in one with the whole legal development in another. Only in this way can we discover and establish the extent of the common influence of Roman ideas on Europe and on America. This is a matter of so great importance that it is worth while to state even more exactly the method which seems to be necessary in the treatment of applied Roman law in America.

Three comparisons of law must be made, two of them "intertemporal," *i. e.* for different periods, and a third international, for the same period, *i. e.* the present. The first step would be to investigate the influence of the Roman texts on the law of continental Europe, especially Germany. Next the influence of these same texts in England and America would be considered. As a third step the results of both comparisons would be compared in order to develop the connections and the contrasts between the two groups

⁵ Cf. Zitelmann, Die Möglichkeit eines Weltrechts, Wien; R. Leonhard in den Studien z. Erl. des bürgerl. Rechts, 17 Heft, Breslau; M. & H. Marcus, 1906, p. iii (über die Wiederverebung des Geistes der alten Pandektenlehre); Munroe Smith, Jurisprudence, N. Y., Columbia University Press (1908), p. 40: "The great problem of the future — that of establishing a world order".

⁶ Cf. Reichsgerichtsrat Hagens in Deutscher Juristenzeitung, 1912, p. 1418.

of European law. Only in this way may we unfold and make manifest the unifying power which the vanished Roman universal empire still wields in the law.⁷

II.

With this purpose I expounded Justinian's Institutes in New York, selecting this work as a foundation for such lectures, because it was written before the development of German science and gives a faithful picture of the old Roman ideas, whereas the German textbooks of Roman law are written in the system of a later jurisprudence which adulterates by the thoughts of later periods a pure impression of the world of Roman ideas.

As it would not be worth while now to publish the whole text of these lectures, designed for beginners of the study of Roman law, I shall only repeat the point of view from which, in my opinion, the rising juridical science in Europe, which treats of the valuable traditions of antiquity, must be regarded. To this I shall add a brief exposition of the general doctrines contained in Justinian's Institutes.

But first let me set forth some general views concerning the character of the Roman influence on the present European and American law.

The codes of Justinian are the result of a development which went through three periods. The first was the old national Roman law, the second was the law of the stage in which the Roman commonwealth ruled a number of other commonwealths, the third was the period of the united world-empire founded at Byzantium, in which the formerly distinct commonwealths were centralized into a new one.

Involuntarily one compares this series of periods with the development of the American nation in the United States. At first there was a settlement of Englishmen. Later we see an alliance of commonwealths of a different character, in which the older English elements prevailed. At last there is a strong tendency on the part of the elements which came later to melt down all differences

⁷ Cf. Munroe Smith, *Jurisprudence*, p. 39: "New also — an invention of our time — is the combination of the historical with the comparative method; and the results in every field of social science have been surprisingly rich."

into a new mass which will be rather a New Europe than a New England.

But let us return to Roman history. The oldest period in Rome was distinguished by a thorough separation of private life from the public power of the kings and their successors, and by joining such an independence of citizens with the strongest force of public authority; whereas with other peoples either the individual liberty or the concentration of authority was wanting, or did not fully develop. This old Roman idea of protecting private life without public interference in the exercise of ownership became the foundation of law for all European peoples. But it is deprecated and attacked by the socialists and by the anarchists, because socialists disapprove private ownership and anarchists disapprove public power. Both parties instinctively regard Roman law as their natural enemy.

The second Roman period, in which Rome was the leader of the civilized world, was the source of the modern system of trade and commerce. The book of the mysterious "Gaius," of which Justinian's Institutes are a copy, was written in this period. This book (*institutionum commentarii quatuor*) is chiefly a treatise on the modes of acquiring substance (*de modis acquirendi*).⁸

The main principle of this system of different forms of acquisition was the idea of unrestrained competition. This idea also has many opponents. But none the less it rules the commerce of most nations and especially of America and Germany, where without doubt it has greatly increased the national wealth.

After these two periods, namely, the stage of evolution of independent private life and the stage of free competition in commerce, followed the third or Byzantine period, the stage of centralization and unification, characterized by the securing of legal protection through a central public authority. This period also represents a gain in human culture. The consequence of this period, namely, unity of the commonwealth, is to be found not only in the despotism of Byzantium, but also in later republican organizations, which above all need internal unity, and is especially noticeable in the United States, which takes just pride in its Supreme Court.

These three principal results of Roman history—independence

⁸ Cf. R. Leonhard, Institutionen, Leipzig, 1894, p. 246.

of private life, competition in commerce, and unity of jurisdiction — existed on English soil in the Roman province of Britain before the immigration of the German tribes. No conqueror has attacked them, although other traces of Roman culture were destroyed. Their foundations stood unshaken through centuries, even in the feudal period. These principles crossed the ocean with the English and Dutch immigrants, and we have yet to see whether revolutionists will succeed in overthrowing them.

Curiously enough, these principles did not have the same consistent development in the history of Germany in the Middle Ages. Here we find a fusion of private and public law, which broke its way also into feudal England but never into non-feudal America. Moreover, in German history we find restraints of commerce in plenty and a splitting up of the public power into diminutive commonwealths.

Perhaps Germany therefore required an absolute allegiance to Roman law in order to restore the three Roman foundations of law which were never wanting in America. The consequence of this allegiance was the greatest increase of economic activity, the development of the full economic strength of the people, and a restraint of all unwholesome elements which are to be feared in the struggle of life. Even in Rome, however, these general tendencies of law were not developed in their full strength from the beginning but only by degrees. Therefore the whole history of the process by which the ideas of Roman law were made into a source of the present law must be studied for all three periods. These ideas are European laws, not eternal laws of nature given to all peoples, but a result of historical events, common to, and characteristic of, not only the law of Germany but the law of the greater-European family. We have spoken thus far only of the conservative character of the study of Roman law. But this study bears also a hope for the future.

The more conscious civilized nations become of the common origin of their law, the easier it becomes for them to fall in with the tendency to set up a common law for the world,⁹ in which all superfluous differences shall be eliminated. Moreover, the perfectly intelligible movement for international conciliation, which

⁹ Cf. Zitelmann, *Die Möglichkeit eines Weltrechts*, Wien, 1888.

seeks to diminish controversies especially among the peoples of a similar culture, cannot be better fostered than by a knowledge of the law which obtains among neighboring nations and its application in international intercourse. The common historical origin of the different systems of law is the master-key to such a mutual understanding. It is as if two brothers, separated in youth from the ancestral home and wholly estranged in different surroundings, on return to their old home are suddenly brought to the recollection of their spiritual kinship through the common memories of childhood. For the civilized European nations the history of Roman law is such an ancestral home, and it must be expounded as such hereafter.

It remains only to add an exposition of the general introduction of Justinian's Institutes by way of example of the method above recommended. I have already pointed out that the Roman authors had a general theory of law which had its value, not merely for their own, but for the law of every people. But this theory was somewhat imperfect and imbued with national ideas which lessened its value for the world in general. Some explanations are to be found at the beginning of Justinian's Institutes which have been taken from other sources than the Institutes of Gaius.¹⁰ In the introduction, the so-called "*proæmium*," in which, according to Byzantine custom, the emperor greeted the new students, there is a characteristic opinion as to the principal end of legal doctrine. Law is regarded as the means of rightly governing (*gubernare*) the commonwealth. This definition really confounds justice and administration, a confusion which arose in the despotism of the later Roman period. But the same definition includes the other idea, that these two forms of public power, which are separated distinctly in America as well as in Germany, are related from a higher point of view, because the one is the supplement of and completes the other, since both increase the common welfare by leading the people along the straight path. That in Justinian's time the contrast between justice and administration had not fallen into oblivion can be seen from the following extracts which we find under the title "*De iustitia et iure*" (Inst. I, 1). The title begins with a sentence which certainly is curious and erroneous if you judge

¹⁰ Cf. Zocco-Rosa, Imp. Justiniani Institutionum Palingenesia, Vol. 1, Catania, 1908.

it by the rules of philology: *Ius a iustitia appellatum*. But an opinion which must be rejected by the philologists may possibly be the naïve expression of a philosophical truth. When the text puts justice first, and law as a derivative of justice, it declares that there is an instinct in man which desires law even where it finds none. This desire is not merely moral but also political. It seeks for a certain permanence of human relations. It procures for human beings a pause for rest in the midst of the struggle for existence. Man cannot endure a perpetual unrest. He requires a place where he may rest. But that is only possible where his abode of peace is guaranteed and permanently secured. This desire for enduring conditions of life and therefore for a lasting possession is the very source of law-making. It is the "*constans ac perpetua voluntas suum cuique tribuendi*," the desire to have a lasting and secure distribution of goods which obtains for all. It follows that the politics of law (*Rechtspolitik*)¹¹ must be distinguished from everyday politics.¹² The latter is unstable, and continually brings forth new movements. But the former makes possible a gradual peaceful prosperity.

The Romans were specialists for both kinds of politics. But they understood how to distinguish them. They had a true instinct for lasting conditions of life for which the principle of constancy should be maintained, as well as an eagerness for struggling against continual new enemies. In other peoples the one tendency overwhelmed the other. We find the Spartan principle, which treated individuals only as members of the whole; we find other peaceful peoples, who neglected the common welfare by fostering the well-being of the individual. But the Roman citizens possessed the faculty of distinguishing between the essentials of public utility and those of private life, and of securing both by their "*constans ac perpetua voluntas*." The origin of this faculty lies chiefly in the circumstance that the authority of the house-father was older than the Roman state, an institution of the period of single settlements in the primeval forest, — a condition which calls to mind colonial America. But it may be attributed also to

¹¹ This is not an easy term to put into English. It means the political aspect of law as distinguished from the general legislative and administrative polity.

¹² *Tagespolitik*. Of course politics is used here in the sense in which we speak of the science of politics.

the constant struggle with the inhabitants of the conquered territory, which calls to mind again colonial America and its Indian wars. Such a situation necessitates strict obedience to the chosen leaders.

No standpoint is too high for the achievement of so difficult a purpose as the "*constans ac perpetua voluntas suum cuique tribuendi*." Hence Ulpian said, and Justinian repeated, "*Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia*." In this definition we find already in antiquity the idea of a connection between all branches of human culture which is identical with the conception of modern sociology. Justinian adds to this definition the observation, that you cannot achieve so high a goal otherwise than by proceeding from elementary studies to the more complicated details. That is the reason for putting the "Institutes" before the "Pandects." The "*præcepta iuris*," mentioned in the same title — "*Honeste vivere, neminem lædere, suum cuique tribuere*" — have a general value for all systems of law. These rules are by no means legal commands. For such a purpose they are altogether too abstract. But they are rules for human life, postulated by law, realization whereof the law strives to make possible. They can obtain a concrete content only from the rules of law with which they are connected.

To begin with, the so-called "*honestum*" was distinguished from the "*iustum*" more sharply at Rome than anywhere else. For the Romans created a special "*regimen morum*," the power of the censor, alongside the power of the consuls and later alongside the jurisdiction which was given to the prætor. By such a distinction of different powers the Roman people were taught to exclude certain social duties from the mechanical operation of the judicial power in order to have them protected by a more arbitrary magistrate. So the rules of decency were distinguished from the rules of law. But nevertheless by calling honesty a "*præceptum iuris*" they acknowledge the close connection between the precept of honesty and the rules of law.¹³ Human customs everywhere fit themselves to the law. As a rule whoever follows these customs may be sure of not offending the law even if he ignores the statutes and the other local forms of law. Only in this way can the ordinary

¹³ Cf. v. Jhering, *Der Zweck im Recht*, Leipzig, 1883, chap. IX.

man, to whom all the rules are not accessible or intelligible in practice, escape the disagreeable consequences of ignoring the law. Therefore there is also a duty incumbent upon the lawgiver to avoid any commands which cannot be respected by custom or which probably will not be so respected. This idea must be emphasized nowadays as a protest against the tireless engines of modern law-making and the over-zeal of parliaments — something of which you have experience also in America. It is scarcely possible to maintain statutes which continually contend with custom.

After such a determination of the field of jurisprudence and its limitation with respect to the practical consequences of law, the Institutes proceed to a fundamental division of law which is now revived in the jurisprudence of all civilized nations, after having been neglected during the Middle Ages. Ulpian says (I, 1, 4; certainly in accordance with the older philosophers): "*Publicum ius est quod ad statum rei Romanæ spectat, privatum quod ad singulorum utilitatem spectat.*" The commonwealth (*res Romana*) must be supported by special rules of law, without which it could not protect private life. The maintaining rules which support the protecting structure are the *ius publicum*; those which protect are the *ius privatum*. The true aim of Roman law may be stated thus: "Conservation of the commonwealth and free individual private use of the media of existence." Thus the gauntlet is thrown down to both anarchy and communism, and a firm common foundation is laid for the law of all peoples of European culture.

In the second title (Inst. I, 2) the law is divided into three parts: *ius civile*, *gentium*, and *naturale*. This terminology is of importance for nearly all nations, although these terms have not always had the same significance, since usage has been influenced by historical circumstances which have shaped their meaning in different ways.

In the first place it is not certain whether the contrast of *ius civile* and *ius gentium* obtains generally or is significant to-day. It is clear that the word "civil" in this connection does not mean private law, and that the *ius gentium* was not at all identical with modern international law. *Ius civile* is defined as the law "*quod quisque populus sibi ipse constituit*" and *ius gentium* as the law

"*quod naturalis ratio inter omnes homines constituit.*" It is said that this latter law *apud omnes peræque custoditur* (§ 1, Inst. I, 4). As examples war, captivity, and slavery are mentioned. The last of these examples shows that it has to do with forms of law which were not in effect everywhere, especially since the Romans well knew that there were nations which killed prisoners of war instead of making them slaves (§ 3 Inst. I, 3). Therefore the proposition that the *ius gentium* obtained *apud omnes populos* must be modified to read, *apud fere omnes populos*. To-day we should not find many rules which obtain even among *fere omnes populos*. To enumerate them would be of little interest except in the light of the question whether some exceptional rules of law of barbarian peoples should be tolerated or not. But this is a modern question which does not seem to have had much interest for the Roman.

Another significance attached to the difference between *ius civile* and *ius gentium* in Roman commerce. From of old a special distinction existed in this connection. There were special forms of business transaction from which aliens were excluded, whereas in other departments of life aliens were recognized as *hospites* and *amici*, not indeed as having equal rights with citizens, and yet as associates in certain commercial relations. Evidently this resulted in part from the impossibility of producing at home everything which they required, and partly from the overproduction of other things which, therefore, they desired to export. Some articles of commerce, therefore, were subjected to certain strict forms of contract, which were forbidden to aliens, and in consequence import and export of such articles — for example, beasts of burden — were practically prohibited. But other property — for example, grain — could be sold by contracts which were allowed also to those aliens who belonged to peoples not entirely without law. Therefore a *ius gentium* existed for commerce between citizens of different peoples, the rules whereof obtained among nearly all peoples not only from past time but through the influence of later development. This body of law was acknowledged at Rome for every people to whom the protection of Roman tribunals was conceded — as well aliens as citizens. It was distinguished from the law whose application was restricted to citizens alone. Its scope was greatly extended, but the contrast of *ius gentium* and

ius civile never wholly disappeared. Such an extension of the *ius gentium* went on also through the Middle Ages and continues even yet in the modern world. Therefore America and Germany alike have come to the conclusion that on principle aliens have no less right in matters of private law than citizens. Only exceptionally are aliens treated as such in these matters. Since the old Roman systematic distinction between the two parts of law was not worth while, the Roman signification of *ius gentium* was forgotten and the term came often to be used to signify the legal relations of one nation to another, *i. e.*, international law, although this does not extend as far as the Roman *ius gentium* and has a different significance.

There has been much dispute also about the *ius naturale* which is discussed in this title. If we read our title carefully, we shall find that two different subjects are referred to, both of which are called natural law. That may have resulted from the way in which the work was composed, for it is a compilation from different originals from which extracts were incorporated. It is first said in the text that there exists a *ius naturale, quod natura omnia animalia docuit*, that is to say, a zoölogical natural law. Later we are told of another natural law which belongs only to human beings. The first-mentioned natural law cannot be regarded as law. It has no interest for judges who are not obliged to give judgments for animals. Therefore the word *ius* does not mean here a real law, but only that human law is dependent upon the physical laws which even now we call laws of nature. An example of law in this sense is the sexual relation, which is called matrimony for human beings only when it is approved by human law. Another example is the begetting and educating of offspring, which also can be seen among many kinds of animals in different forms and degrees. Following this point of view it would also have been possible to mention the satisfaction of hunger and the desire to sleep and to be protected against the rigors of the weather. This conception of natural instincts as the occasion of law-making has no direct practical importance either for the administration or the science of law. But perhaps it was wise in the Roman author to advise the lawgiver not to awaken the brute man by overlooking his natural desires. Perhaps, also, the other sentence contained in our title pertains only to the physical laws of nature, namely,

the assertion that *naturalia iura quæ apud omnes gentes peræque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent* (Inst. I, 2, 11). We cannot believe that the Roman, who knew many nations so well, believed that the same actual law could exist for all time for all different nations. Perhaps that might be true of certain rules, the result of history, which, to be sure, seem to have an immutable character and which it is hoped will never disappear, such as, for instance, the principle of human monogamy.

But in addition to the facts of nature upon which humanity is eternally dependent the name of natural law is also applied to certain rules of law, which correspond to nature, but in spite of this are not actually observed everywhere, but are corrupted by unnatural statutes. This is what is meant by the distinction between the so-called positive and the natural law. The Institutes give as an example the law of slavery, which existed everywhere in antiquity as an institution of the *ius gentium*, although it seemed in conflict with a certain *ius naturale*.

No doubt, instead of saying that slavery did not exist in a state of nature in which the prisoners of war were all killed instead of being enslaved,¹⁴ it should be said that we have here the dawning of an ideal of future abolition of slavery which was already recognized by the Romans. At any rate the *ius gentium* is distinguished from the *ius naturale* with respect to slavery, whereas in another connection these two types of law are identical (Inst. II, 1, 40), since those rules which obtain among many peoples seem to be more natural than the special creations of a few nations. In this sense "natural" is not an epithet of criticism for the undeveloped, but a term of approval for the law adapted to its end, or, as Stammler puts it, "*das richtige Recht*."¹⁵

A distinction between the law which actually obtains and the law worthy of approval which ought to obtain cannot be overlooked by the critical sense of a people even to-day. It is true the standards of what is worthy of approval are diverse and often rest only upon personal preference. But it has often happened, and still happens, that a considerable body of the people, especially powerful political parties, disapprove certain rules of law, such as, for in-

¹⁴ Cf. "*ab initio*" in Inst. II, 1, 2.

¹⁵ Stammler, *Die Lehre von dem richtigen Rechte*. Berlin, Guttentag, 1902.

stance, cruel forms of capital punishment, so strongly that their disapproval cannot be overlooked by jurisprudence and must be recognized alongside of the actual law. The fanatical limitation of theory of law to what actually obtains, blinding oneself to contrary currents of popular thought, cannot be approved. Hence there is no justification for the undue invective which, since its alleged overthrow by the historical school, is directed against a theory which would recognize the contrast between the law which obtains and the law which many desire. In this connection the idea of natural law has an enduring value.

There follows in Justinian's Institutes another division into the written law and the unwritten law (*ius scriptum* and *ius non scriptum*) (Inst. II, 2, 3). These forms are spoken of as a peculiarity of Greek and Roman law, but they exist also in England, America, Germany, and other countries. However, it would be better to-day to use the term "printed law" instead of "written law."

But the following division of the law into *leges*, *plebiscita*, *senatus consulta*, *principum placita*, *magistratuum edicta*, *responsa prudentium*, cannot be maintained for modern commonwealths, especially in the case of America and Germany, in the strict Roman sense. This enumeration was correct even in Justinian's time. The power of legislation was then in the hands of the emperor, whose general commands were called "*leges*." The other names for the forms of written law are mentioned by Justinian only in order to explain better the contents of his compilation of the older law, in which these old terms occur many times. Only for such a purpose could the old distinction of *lex* and *plebiscitum*, abolished long ago, when both forms of the ancient assemblies of the Roman people disappeared, be worth mentioning. These ancient assemblies were gatherings of all the citizens, not assemblies of deputies or representatives, as in modern legislatures. Therefore they became too difficult to handle when the old city-state changed to a commonwealth extending over the large territory of Italy. Thus it happened that other ordinances, which formerly existed beside the laws of the people and dependent upon them, came into the first line as true sources of law. So the *senatus consulta*, the resolutions of the Roman senate; the edicts of the magistrates, which introduced the famous dualism of the *ius civile* and *ius honorarium*, a

dualism lost by the mingling of the two in the later law of the Byzantine Empire; the *responsa prudentium*, opinions of learned teachers and expounders of the law; all came at last to be regarded by Roman practice as true laws.

But all these sources of law were superseded by the commands of the emperors in the period of absolutism, not only in the Roman empire, but in all commonwealths in which an absolute government grew up. This form of government has been weakened nowadays almost everywhere by constitutionalism. In America it never existed, because even in the old royal times the English law was constitutional.

As to the unwritten law customary law alone is mentioned by Justinian's Institutes. This source of law has by no means had the same influence everywhere and in all times. The common law of England and America certainly belongs here. But there is a controversy as to whether the great value attached to precedents in English and American practice must be regarded as constituting a customary law.¹⁶ I do not believe it does. Precedents govern subsequent decisions by their mere authority, not because they have been sanctioned by a long course of observance. On the other hand they may be overruled by a later decision of itself, without waiting for a long course of observance to give the overruling case the authority of a new law.¹⁷ This weight of authority given to former decisions seems to me to be a consequence of the need for a well-defined law which shall be as certain as possible. This natural need was met sufficiently for the Roman people and the nations of continental Europe by the different forms of written law. For England precedents served the same purpose. The authority attributed to a judicial decision for the future must not be confounded with its authority in the case to which it is given. Roman terminology calls this function of a decision a *ius* (*res iudicata ius facit inter partes*), because a decision binds the parties

¹⁶ Cf. the preface to the translation of O. W. Holmes, *The Common Law*, by R. Leonhard, Leipzig, Duncker & Humblot, 1912, p. iii.

¹⁷ Cf. Schmitt-Falkenberg, *Eine Studie ueber das Verlöbnis in England*, Breslauer Dissertation, 1911, p. 10 ff. [It should be explained in this connection that Professor Leonhard is contrasting the Anglo-American doctrine of precedents with the continental doctrine of *usus fori* or *Gerichtsgebrauch*. According to the latter doctrine single decisions have no binding force as precedents, but a long-continued course of decision is regarded as having the force of law. — Ed.]

and really makes a new law in those cases where the judge may create, in accordance with his free discretion, a new obligation *ex fide bona*, a new idea which is drawn neither from the words of a rule of law nor from the examples of a prior usage. Such an absolutely free discretion was rejected as a matter of principle by Justinian (Inst. IV, 17, pr. *ne aliter iudicet, quam legibus aut constitutionibus aut moribus proditum est*). But this certainly had no practical effect, because no tribunals can exist without such discretion. In England and America, where there is no complete codification, this judicial "creative power," as we are wont to call it of late, has flourished exceedingly.

If we look at the poverty of general doctrines contained in Justinian's Institutes we may easily underrate the worth of Justinian's legislation for posterity. This treasury of ideas which became common to the circle of European civilization, and the manner in which a common juridical thought became an inner bond for all European culture, can only be set forth in lectures upon the whole system of law, as I tried to expound it in New York. The only purpose of the foregoing sketch is to show the method in which that is to be done, and to give an example of the mode of treatment by applying it to the general doctrines of law.

In conclusion, let me repeat, by way of summary, the main points of what has gone before. Roman law has a value for all nations, for two reasons. In the first place, the Roman jurists worked out a technical method of applying law which has furnished models for every other law, even for wholly different legal systems. Secondly, Rome developed certain fundamental principles of private law which are characteristic of the special civilization of Europe. For both reasons America above all other nations has a vocation to foster Roman jurisprudence. First, because there is in America an excellent national technique of jurisprudence which may be compared with the Roman counterpart in order to shape an ideal theory of a perfect exercise of the art of judicial decision of civil causes. Secondly, because the United States is the only country in which the different national cultures of Europe have been united in a new culture. Moreover, Munroe Smith has shown clearly that there are many legal analogies between ancient Rome and the United States arising from their common republican con-

stitution.¹⁸ Therefore the duty of commenting upon and expounding the common interests and the common ideas of right and law of the greater-European civilization has devolved primarily upon New Europe.

Rudolf Leonhard.

UNIVERSITY OF Breslau.

¹⁸ Columbia Law Review, 1904, p. 523 ff. Translated by R. Leonhard in *Stimmen des Auslands usw.*, Breslau, 1906.

INTERNATIONAL ARBITRATION OF JUSTICIABLE DISPUTES.

THE general arbitration treaties with Great Britain and France, signed at Washington on August 3, 1911, but subsequently amended by the Senate, and not yet ratified, provided for the arbitration of differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity," and thereby brought prominently before the public the question of what was meant by the word "justiciable." Opponents of the treaties attacked the word as being novel and indefinite. Even one of the most learned defenders of the treaties considered that it was "unfortunate that no better word than 'justiciable' could be found," as few people understood its meaning without a lengthy explanation, and any explanation led toward the borders of obscurity.¹ The present explanation is attempted, not so much on account of these particular treaties, as for the sake of showing that treaties for the arbitration of justiciable disputes are correct in theory because they are based upon the concept of legality, and that they are exceedingly practical because they simply apply to international law a well-established principle of national or municipal law. Nor are they as far behind treaties for the arbitration of all controversies of any nature whatsoever as is generally supposed.

"Justiciable" is defined in the Century Dictionary as "proper to be brought before a court of justice, or to be judicially disposed of." The word "jural" is sometimes used in a similar sense.²

If controversies between individuals were decided according to the judge's individual standard of right and wrong, the theory that some questions are not jural would not necessarily be recognized. The individual standard could be separately applied to every case and every conceivable question could thus be settled. Such may be the situation in primitive society where the ruler or judge sits to redress all grievances which may be brought before him and

¹ Simeon E. Baldwin in *The Independent*, Aug. 31, 1911.

² 1 Pomeroy's *Equity Jurisprudence*, 3 ed., 68, 69.

knows no limits to his jurisdiction. Early English chancellors sometimes administered equity in much the same way — by a personal rather than by a judicial conscience — and were deservedly criticized by Selden, because their consciences were as variable as the size of their feet.³ But cases thus decided are more properly regarded as precedent to, rather than as a part of, any judicial system.⁴ As soon as municipal law becomes systematic, it recognizes that all jural rights and wrongs are contained within a well-defined circle which may expand or contract, but outside which it is not competent to go. Even though, in the absence of express law, judges are required to act according to “natural law and reason,”⁵ the effect is merely to enlarge the area and not to abolish the circumference of the circle.⁶

In a Louisiana case,⁷ where the wardens of a church sought to recover damages from the bishop of a diocese for improper management of church affairs, reliance was placed upon a provision of the civil code that “every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”⁸ The defendant’s contention that no cause of action was set forth “of which the court can, or ought, to take cognizance” was nevertheless sustained. The court said that the articles of the code were “not to be understood in their literal sense, as applicable indiscriminately to all acts whatever,” that men are only liable for “illegal” acts and that courts of justice do not sit to enforce spiritual obligations. Similarly, courts do not assume jurisdiction over a large class of cases in which the damages are too trifling, remote, indefinite, or intangible to be assessed,⁹ or over mere “moral claims not recognized by law,”¹⁰ or over mental conceptions not expressed in overt acts. “The thought of man shall not be tried,” said Brian, C. J., in a case which arose several cen-

³ Table Talk, *tit.* Equity.

⁴ See Maine’s Ancient Law, Ch. I.

⁵ Merrick’s Rev. Civ. Code of La., Art. 21.

⁶ See *Baker v. Louisiana Portable R. Co.*, 34 La. Ann. 754 (1882); *Hoover v. Hoover*, 30 La. Ann. 752 (1878).

⁷ *Wardens of the Church of St. Louis v. Blanc*, 8 Rob. (La.) 51 (1844).

⁸ Merrick’s Rev. Civ. Code of La., Art. 2315. See also Art. 2316.

⁹ See Weeks, *Damnum Absque Injuria*.

¹⁰ *Ohio & Mississippi R. Co. v. Kasson*, 37 N. Y. 218, 224 (1867). See also 1 Bl. Comm. (3 ed., Cooley), 123 n., on “Moral Claims Often Called Rights.”

turies ago, "for the devil himself knoweth not the thought of man." ¹¹

If a case involving a non-justiciable question is dismissed for lack of jurisdiction, the practical result is the same as if jurisdiction had been assumed but recovery denied. Consequently, it is frequently difficult to determine upon which theory a court has proceeded. Yet whether a dispute is justiciable so that it can be decided by the application of principles of law or equity is, of course, an entirely different question from whether a party has a good or bad cause of action.¹² If it cannot be so decided, relief is more properly denied on the former than on the latter theory.

Although disputes must be susceptible of decision by the principles of law or equity in order that municipal law may be applicable, yet its applicability is not defeated by the fact that independence, honor, vital interests, integrity of property, or interests of third parties are involved. In *Sommersett's Case* ¹³ and in the *Dred Scott Case*,¹⁴ questions of personal independence were decided. Similar questions are every day involved in libels for divorce or applications for a writ of *habeas corpus*. In actions to recover damages for the use of defamatory words, questions of personal honor are decided without resort to violence. In a trial for murder, vital interests of the defendant are certainly at stake. In actions of ejectment or to establish boundaries or rights of way, integrity of property is constantly involved. Nor do courts necessarily decline to act, because the interests of third parties may be incidentally affected. A court of equity would enjoin Johanna Wagner from singing for Mr. Gye in violation of her contract with Mr. Lumley, even though it could acquire no jurisdiction over Mr. Gye. In other words, the exceptions with which treaties of international arbitration are ordinarily stultified, do not prevail in municipal law, which is administered in accordance with the test adopted in President Taft's proposed treaties.

That this test is not novel or indefinite is further shown by cases arising between federated states under constitutions or statutes

¹¹ Y. B. 7 Ed. IV, f. 2, pl. 2.

¹² See 1 Pomeroy's Equity Jurisprudence, 3 ed., 150, 151.

¹³ 20 How. St. Tr. 1.

¹⁴ 19 How. (U. S.) 393 (1856).

analogous to treaties between independent nations. From an examination of such cases, it appears that the test has been generally recognized and that the word "justiciable" has been frequently used.

Article III of the Constitution of the United States provides that the judicial power of the United States shall extend "to Controversies between two or more States," and that the Supreme Court shall have original jurisdiction in all such cases. Since this jurisdiction has been successfully invoked in a large number and variety of important cases and does not appear to be restricted to any particular class of controversies, it has frequently been argued that there is no logical reason why an international agreement to arbitrate all controversies of every nature whatsoever before an international court could not be put into equally successful operation. From the decisions of the Supreme Court involving the interpretation of this article it will, however, be found that the term "controversies" is not interpreted to include controversies of every nature whatsoever, but is limited in meaning to justiciable controversies.

It may be that this result could be reached upon the theory that inasmuch as the Supreme Court was granted only the "judicial power" of the United States, its jurisdiction was limited to the decision of cases which were capable of judicial settlement.¹⁵ This theory involves merely a strict interpretation of the clause by which jurisdiction was conferred. Yet the Supreme Court does not appear to have relied upon or to have had this possibility in mind, at least in its more recent decisions.

In *Missouri v. Illinois*¹⁶ the court said:

"From the language, alone considered, it might be concluded that whenever and in all cases where one State may choose to make complaint against another . . . the jurisdiction of this court would attach."

The court nevertheless considered that the jurisdiction was not as broad as the language would indicate, and proceeded to read into the federal Constitution exactly the same limitations upon

¹⁵ See "The Development of the American Doctrine of Jurisdiction of Courts over States" by Alpheus Henry Snow, published May, 1911, by the American Society for Judicial Settlement of International Disputes.

¹⁶ 180 U. S. 208 (1901).

judicial power as have been expressly set forth in President Taft's proposed treaties.

In *Louisiana v. Texas*¹⁷ the state of Louisiana sought to enjoin the state of Texas and its officials from enforcing an alleged discriminative embargo under the guise and pretense of a quarantine regulation against yellow fever. The state of Texas demurred upon the ground among others that the matters complained of did not constitute a "controversy" within the meaning of the federal Constitution. In sustaining the demurrer and dismissing the bill Fuller, C. J., who delivered the opinion of the court, said:

"The jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly *justiciable*.

"Undoubtedly, as remarked by Mr. Justice Bradley in *Hans v. Louisiana*, 134 U. S. 1, 15, the Constitution made some things 'justiciable' which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. . . . The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction."¹⁸

The High Court of Australia has recently taken the same view as the Supreme Court of the United States as to the limits of its jurisdiction.¹⁹ In a case brought by the state of South Australia against the state of Victoria for the determination of the boundary line between the two states, it was argued for the defendant state that the High Court had no jurisdiction, because the case involved a political or, at any rate, a non-justiciable question. Section 75 of the Australian Constitution provides that the High Court shall have original jurisdiction in "all matters between States." Although the court held that a question of boundaries was capable of determination on recognized legal principles and was, therefore, justiciable,

¹⁷ 176 U. S. 1 (1900).

¹⁸ And Harlan, J., in his concurring opinion, said that the word "controversies" referred "to controversies or cases that are justiciable." See also *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888).

¹⁹ *The State of South Australia v. The State of Victoria*, 12 C. L. R. 667 (1911).

it repeatedly expressed the view that "it is only where the matter in controversy between States is 'justiciable' that the High Court can entertain it."

Griffith, C. J. "I assent to the argument that the jurisdiction of the High Court, if any, is judicial and not political. So far, therefore, as a controversy requires for its settlement the application of political as distinguished from judicial considerations, I think that it is not justiciable under the Constitution."²⁰

"In my opinion a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. This definition includes all controversies relating to the ownership of property or arising out of contracts."²¹

O'Connor, J. "The Australian Constitution . . . limits the power of settling disputes between States in boundary disputes, as in other cases, to those in which the matters in controversy can be determined by the application of recognized legal principles."²²

Isaacs, J. "The first question is as to the jurisdiction of the Court to entertain the suit. This depends on the meaning of the word 'matters' in sec. 75 of the Constitution. In my opinion that expression, used with reference to the judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject and which therefore governs their relations, and constitutes the measure of their respective rights and duties.

"To extend the meaning of the term beyond this, would leave the Court without any limits of jurisdiction between States except the fact of some dispute, irrespective of cause or subject matter, and therefore possibly a controversy without any standard of right, but involving judicial interference with political and administrative action and discretion, a position unheard of, and altogether outside the pale of sober thought."²³

It is interesting to note that O'Connor, J., reached his conclusions in spite of an impression that the Constitution of the United States conferred upon our Supreme Court unlimited jurisdiction to settle disputes between states. His reasoning on this point is as follows:

²⁰ *The State of South Australia v. The State of Victoria*, *supra*, pp. 674, 675.

²¹ *Id.*, p. 675.

²² *Id.*, p. 709.

²³ *Id.*, p. 715.

"At the time when the latter Constitution was framed, boundary disputes existed between several of the States. As each State had full rights of sovereignty over its own territory, no common code of laws could be applied in the determination of these controversies, and in most cases they were settled as such disputes are usually settled between independent nations. In some cases principles of international law were appealed to, but much oftener considerations of fair dealing, public convenience, or political expediency were the bases of adjustment. The earlier Union or Confederation of States had vested in it the power to settle such disputes between States, and when, in the framing of the United States Constitution, the power to adjudicate in 'controversies between the States' was conferred on the Supreme Court of the United States, it was clearly intended to vest in that tribunal all the power of settlement and adjudication which up to then had been exercised by the Confederation, that is to say, the power to determine matters not justiciable as well as matters justiciable. The Supreme Court of the United States, in settling boundary controversies between States, has always acted on that view of its powers. That is made abundantly clear in one of the latest cases, *Maryland v. West Virginia*, 217 U. S. 1."²⁴

Much weight might be given to the historical argument of O'Connor, J., particularly in view of the very broad language in the Articles of Confederation conferring upon Congress jurisdiction over "all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever,"²⁵ were it not that the debates upon, and proposed drafts of, the Constitution clearly show that it was not intended to vest in the Supreme Court the same jurisdiction that had formerly been conferred upon the Continental Congress.²⁶ Moreover, *Maryland v. West Virginia*, which involves merely a question of boundaries between states, contains no language indicating that the court would ever assume to decide non-justiciable disputes between states, and *Louisiana v. Texas* and other cases already referred to clearly show that our Supreme Court has never taken so extended a view of its powers.

In a recent Canadian case²⁷ the same limitations upon jurisdiction were suggested, although not as clearly defined as in the Ameri-

²⁴ *The State of South Australia v. The State of Victoria*, *supra*, pp. 708, 709.

²⁵ Articles of Confederation, Art. IX.

²⁶ See *Missouri v. Illinois*, *supra*.

²⁷ *Dominion of Canada v. Province of Ontario*, [1910] A. C. 637.

can and Australian cases. The Dominion of Canada sought to recover from the Province of Ontario for certain expenditures which it had independently made for good and sufficient reasons of its own, but which had resulted in direct advantage to the other. The case originally came before the Canadian Court of Exchequer under a statute giving it jurisdiction "of controversies between the Dominion of Canada and this Province."²⁸ The statute was not in its terms limited to justiciable controversies. It was accordingly argued by counsel for the Dominion that "even if no principle of municipal law could be found applicable, the case should be governed on such principles of equity and fairness as regulate the respective rights and obligations of distinct and independent States." Upon appeal to the Judicial Committee of the Privy Council, Lord Loreburn, however, said:

"Their Lordships are of opinion that in order to succeed the appellants must bring their claim within some recognized legal principle. The Court of Exchequer, to which, by statutes both of the Dominion and the province, a jurisdiction has been committed over controversies between them, did not thereby acquire authority to determine those controversies only according to its own view of what in the circumstances might be thought fair. . . . In the present case it does not appear to their Lordships that the claim of the Dominion can be sustained on any principle of law that can be invoked as applicable."

In view of this well-settled principle that municipal courts assume jurisdiction only over justiciable disputes between individuals and in view of the strong tendency shown by the highest courts of the United States, Australia, and the British Empire to read similar limitations upon their jurisdiction into constitutions or statutes relating to quasi-international disputes, it may, perhaps, be asked: "Why advocate treaties for the arbitration of justiciable disputes between nations, when treaties for the arbitration of all disputes whatsoever might well be interpreted to have no broader meaning?" Or, to reverse the question: "Why go so far as to advocate treaties for unrestricted arbitration when the same result might be reached by treaties for the arbitration of justiciable disputes?"

In the first place, the two forms of treaties do not have the same interchangeable meaning in international that they might have

²⁸ R. S. Ont. 1897, c. 49, s. 1. See also R. S. Can. 1906, c. 140, s. 32.

in municipal law. This is due to the fact that international arbitration, unlike municipal law, is not limited to the determination of justiciable questions. Since an international tribunal may be constituted by agreement of the parties for the settlement of questions of any nature whatsoever, it has no inherent lack of jurisdiction to determine non-justiciable questions. If it is expressly constituted to settle a non-justiciable question, it cannot properly decline to take jurisdiction because the question is non-justiciable. Its jurisdiction is as broad as the terms of the treaty or other agreement by which it is constituted.

"By consent every possible difference, whether legal or political, can be settled by arbitration, whether the verdict is based on rules of international law, natural equity or compromise."²⁹

In their availability for the settlement of non-justiciable questions, as well as in some of their other aspects, arbitration treaties are analogous to agreements between individuals to submit their differences to a specially constituted board of arbitrators instead of to the regular courts. Individuals may submit a question to arbitration, although neither one of them would have any standing in the regular courts.

"That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough."³⁰

It follows that an arbitration award between individuals like an arbitration award between nations is not always based upon recognized principles of law, for if the question submitted is not capable of determination upon any such principles, of course the award necessarily rests upon other grounds.³¹

Awards which are based upon considerations of expediency or compromise are likely to be far less satisfactory than awards which are based upon recognized legal principles. There is an indirect

²⁹ 2 Oppenheim on International Law, 18.

³⁰ *Downing v. Lee*, 98 Mo. App. 604 (1903), quoting *Morse on Arbitration and Award*, 36.

³¹ See *Lawrence on International Law* (4 ed., revised), 580, as to nations; as to individuals *cf. Leslie v. Leslie*, 50 N. J. Eq. 103, 108 (1892), where the court said as to the powers of arbitrators: "In cases where they do not intend to let the law govern their judgment, but to decide according to their own notion of what is just and right, the courts will not interfere, but allow their award to stand."

tendency to discourage the arbitration of differences between individuals which cannot be settled upon legal principles, by confining submissions under state statutes to controversies which are capable of sustaining a civil action.³² As to controversies between nations, it is well recognized that arbitration is a far more effective method of settling justiciable than non-justiciable questions.

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."³³

Indeed, if the growing tendency to confine the object of international arbitration to "the settlement of disputes between States . . . on the basis of respect for law"³⁴ is to prevail, then non-justiciable disputes will have to be excluded either implicitly or expressly from arbitration treaties. The scope of international arbitration would then correspond exactly to the scope of municipal law as administered by the courts. Non-justiciable disputes which diplomacy had failed to adjust could be settled by mediation more properly than by arbitration. A mediator

"ought not to insist scrupulously upon exact justice. He is a conciliator and not a judge; his function is to procure peace; and he ought to induce one who has law on his side to concede something if it is necessary."³⁵

The preceding remarks may seem somewhat reactionary to pacifists who hope for and ultimately expect a world treaty for the arbitration of all international disputes without reservations. On the other hand, it may well be that the desired result can better be attained by treaties like those proposed by President Taft than by those of the Central American type:³⁶ first, because they will

³² See 3 Cyc. 591, for cases arising under such statutes.

³³ Second Hague Conference: Convention for Settlement of International Disputes, Article XXXVIII.

³⁴ *Id.*, Article XXXVII.

³⁵ Vattel, *Le Droit des Gens*, Liv. II. ch. xviii, § 328.

³⁶ In 1907, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador agreed to submit to arbitration "all controversies or questions which may arise among them,

meet with less opposition from opponents of the international peace movement in that they do not appear to be so extreme; and secondly, because the test of justiciableness, like the principles of municipal law, can be readily expanded to keep pace with the development of international civilization and the requirements of international opinion. The first reason is sufficiently obvious; the second may require some explanation.

As already suggested, a court which has unlimited jurisdiction over disputes between individuals or federated states determines all disputes between them of a justiciable nature and no others. But with the growth and development of municipal law the number and character of disputes which are transferred from the non-justiciable to the justiciable docket constantly increases. The development of the law of quasi-contracts in modern times is one of the best illustrations. By applying general principles of natural justice and equity to the affairs of everyday life, Lord Mansfield brought within the jurisdiction of courts of common law a mass of questions which would formerly have been considered only in a court of morals.

There is no reason why international law, like the common law, should not expand in such a way that an ever-increasing number of questions will be considered "susceptible of decision by the application of the principles of law or equity."

In *Dominion of Canada v. Province of Ontario*, Lord Loreburn considered that there was no principle of law upon which the claims of the Dominion could be sustained, although he added that as a matter of fair play the province, perhaps, ought to be liable for some part of the expenditure which had resulted to its advantage. Law and fair play might, however, have been brought into harmony by only a very slight expansion of the principles of quasi-contracts as expressed in the maxim *Nemo debet locupletari ex alterius incommodo*.

In 1295, Edward I's court declared in solemn fashion that it would not entertain pleas of defamation.³⁷ Although such pleas doubtless involved questions of personal honor, yet the king's

of whatsoever nature, and no matter what their origin may be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding." Supplement to 2 Am. J. Int. Law, 231-243.

³⁷ 2 Pollock and Maitland, History of English Law, 535.

courts later assumed jurisdiction over them without difficulty. Similarly, international tribunals have always been reluctant to deal with insults or indignities to nations, but why should they not follow the king's courts and take jurisdiction? International law is entirely competent to treat questions of national honor as well as numerous other questions as justiciable, whenever international public opinion so demands. Indeed, on account of its derivation from the law of nature, its comparative freedom from technicalities, and the character of its litigants, its powers of expansion should be far greater than those of the common law. It has been well said by our own Supreme Court that "great states have a temper superior to that of private litigants," and that a case between them "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy."³⁸

"In international arbitration the concept of legality tends to broaden out into interpretations which are based upon ideas of equity, justice, and fair dealing. The term 'justiciable' is, therefore, not confined to what is legal in the strictest sense of the word, but it also, if we consult the recent experience of nations, would be held to cover any matters in which a definite ascertainment of international duty and propriety is desirable. Whenever the rightfulness and justice of conduct is capable of determination by a body of impartial judges, a judicial question exists."³⁹

If international law is capable of expansion until it regards all matters in which a definite ascertainment of international duty and propriety is desirable as "justiciable controversies," then treaties which provide for the arbitration of all such controversies will become all-sufficient. A claim which could not be brought within this broad conception of justiciableness would not receive or deserve recognition in the family of nations. If under a treaty for the arbitration of all justiciable controversies, such a claim were submitted and were dismissed as not justiciable, the dismissal would be equivalent to the finding that the claim was not proper or just. Further action on the claim should then be considered as barred as effectually as if the court had taken jurisdiction and denied the claim. Thus, by such treaties, the same result might

³⁸ *Virginia v. West Virginia*, 220 U. S. 1 (1911).

³⁹ Paul S. Reinsch in 5 *Am. J. Int. Law*, 607.

ultimately be reached as by more radical treaties referring to arbitration all disputes of every nature whatsoever. If international arbitration is to be developed as a method for the judicial settlement of international disputes rather than as a method of conciliation and compromise, the conservative form of treaty may be the more desirable, because it is the more judicial.

William W. Thayer.

CONCORD, NEW HAMPSHIRE.

THE DOCTRINE OF CONSIDERATION.

IN spite of all that has been written and said in explanation of the doctrine of consideration, the law is still far from clear upon the subject. The courts are not consistent in their application of the rule, partly because they are unwilling to enforce it strictly in all cases, and partly because they are often hazy in their understanding and knowledge of the topic. All this leads to present uncertainty and doubt. It is further true that consciously or not the law of consideration is being modified gradually, until the present technical requirement is likely to be entirely abolished.

Thus it is said in one case¹ where lack of consideration was urged as a defense:

"Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be 'a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged.'"

This view would abolish the law of consideration and introduce the rule enforced under modern Roman-law systems. If this change is desirable it should be brought about by the legislature. Such a decision is simply an unwarrantable usurpation of legislative powers by the court. The usurpation may be conscious, or it may arise from an attempt to apply the law without a clear comprehension of its principles.

It will not be out of place to examine a few of the doubtful propositions. For example, must consideration be presently exchanged for an offered promise or may it be given subsequently?

Recently a thoughtful writer has given the following definition:²

¹ Ricketts v. Scothorn, 57 Neb. 51 (1898).

² Dean Henry Winthrop Ballantine, Contracts, 7 Commercial Laws of the World, 81.

"Consideration is primarily the test of bargain, and may be defined as the thing which the promisee gives or promises to give in exchange for the thing promised; not for the promise, as it is usually expressed."

To the objection that under this description only unilateral contracts are possible the writer replies:³

"That is true if I grant the 16th century premise 'that in all agreements there must be *quid pro quo* presently.' . . . I do not admit, however, that the contract cannot arise until the consideration is actually furnished."

And he also adds that he would amend the language in my text⁴ on Contract to read,

"Consideration is something furnished *or to be furnished* to the promisor at his request and in exchange for *what he promises*."

It seems to me that this is not the generally accepted conception of consideration. As the view comes from an authoritative source it is deserving of careful examination. We are not here concerned with the origin of the doctrine. The question of importance to-day is as to what is now consideration and when it must be furnished. According to the idea given above, consideration is not an element of contract, because it is said that it is incorrect in bilateral contracts to speak of the exchange promise as the consideration, but rather is it the thing promised, *i. e.*, the performance of the promise rather than the promise itself. It is well settled that the contract must arise, when bilateral, at the time the counter promise is given. If this counter promise is not the consideration, but its performance is, then the contract arises before the consideration is furnished, and we have the possibility of a contract without consideration. In other words, neither party can withdraw; and this is so whether the demanded consideration, *i. e.*, the promised performance, is ever furnished or not. According to this view the counter promise amounts to no more than an acceptance, and there would seem to be no real difference in result between an offer calling for a unilateral or bilateral contract. In either event the contract seems to come into existence upon acceptance, and not to be delayed until performance. But

³ In private correspondence.

⁴ Ashley, Law of Contracts, p. 65.

if it be said that in a bilateral contract the counter promise is an obligation, but not consideration, then what is the consideration for this counter promise, and to what does it obligate? If it is the performance of the first promise, then each arises and becomes binding without any consideration, and there is merely the contemplation of performance as the basis of the agreement. Just what part the requested consideration may then play seems uncertain. Apparently the only method by which its enforcement could be secured would be by making it a condition precedent to the performance of the obligation contained in the promise for which it is required. Dean Ballantine further says:⁵

"If we rationalize the doctrine of consideration, we shall find that the apparently arbitrary and technical rules of consideration furnish a touchstone or test of two substantive qualities in the transaction, viz.: (1) Is the engagement of the parties put on the basis of bargain, or is the real basis gratuitous? (2) If a bargain is found, does the subject matter given in exchange have sufficient possibility of value to be the foundation of a legitimate claim, or is it obviously insufficient?"

Here is suggested the idea that consideration is merely for the purpose of showing that a bargain is contemplated. This leads to the natural conclusion that inquiry may be made as to the reasonableness of the proposed exchange. An idea of this sort was suggested in some of the cases dealing with the doctrine growing out of the decision in Pinnel's case.⁶ It has been generally recognized that the question of reasonableness was not involved in that decision. While one dollar would not sustain a present proposed exchange for \$1000, a beaver hat would.⁷ In *Schnell v. Nell*⁸ the court had the same thing in mind when it said:

"In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken."

Consideration is not for the purpose of showing an intended business arrangement. In fact the transaction is sometimes meant

⁵ Contracts, 7 Commercial Laws of the World, 81.

⁶ 5 Co. Rep. 117 (1602).

⁷ *Foakes v. Beer*, 9 App. Cas. 605 (1884).

⁸ 17 Ind. 29.

to be gratuitous, and the requested consideration desired purely to meet the technicality.

The elements of simple contract are mutual assent and consideration. If either is lacking, there is no contract, whatever other obligation may arise. There are exceptions to this general rule, such, for instance, as compromise cases, but the rule itself has been universally recognized.

It might be well if what Dean Ballantine has described were the law, and if it were merely necessary that a contract should contemplate a business relationship. This would be a question of fact, of which consideration would furnish some proof. It is submitted that such is not our law. It is believed that a contract does not arise until consideration is furnished, and without this essential there is no legal obligation. If an act is requested, there is no promise until the act is performed. But when we say that a bilateral contract is contemplated we indicate by such language that a counter promise, *i. e.*, an obligation, is required by the parties as consideration. Such is the intention of the offer in the supposed case. But if the two promises when exchanged are binding, as they assuredly are, there must be a contract then and there. Suppose now the first promise is to pay money on a date and the second is to do an act at a subsequent time. If when the money is due it is properly tendered and refused and the tender is kept good, there would seem to be no doubt that the other party is bound to perform when the subsequent date arrives and will break his contract if he refuses. Yet as the money has not been paid there has been no performance of the first promise, and hence according to the proposed hypothesis the second promise is without consideration. Or suppose it is a case where the performance consists of the payment of money on one side, and the delivery of a deed or other chattel on the other, both to be performed at the same time. In that event there are mutual and concurrent conditions, and a tender by either party puts the other in default. But a tender is not performance, and if performance is consideration, then the second party is bound to perform without consideration.

In bilateral contracts the counter promise and not its performance would seem to be the consideration demanded, and hence it must be presently exchanged and the consideration cannot be future.

Sometimes there seems to be doubt in regard to "past consideration." It is well settled that consideration cannot be "past," because in that case the so-called "past consideration" has already been furnished, and is not given in exchange for the intended promise.

But in a unilateral contract the act must have been performed before the promise can arise, and hence at first blush it would appear to be "past." The difference is that when an act is done pursuant to an offer it is performed in exchange for the proposed promise, while in instances of "past consideration" this is not so. In the latter case the thing desired has been given prior to the offer, and hence the offerer is no longer able to comply. He cannot give that which is no longer his.

Again, questions have always been raised concerning the nature of bilateral contracts. They were once described as follows:⁹

"When the consideration on each side is a promise the contract is bilateral; a binding promise, the consideration of which is anything else than a promise, is a unilateral contract."

The question is, then, what is the consideration in bilateral contracts? Is it the counter promise or performance of such promise? As described above by Mr. Wald, it is generally believed to be the mutual promises each for the other. But it is suggested that there is a difficulty here. That the two promises must support each other, and neither can be a promise until the other becomes one. The first step is merely an offer, and must ripen into a promise to serve as consideration for the counter promise. But such counter promise must itself serve as a consideration for the original promise which springs from the other. Sir Frederick Pollock suggests¹⁰ that many objections might have been urged in the first instance, and substantially relies upon the settled law as obviating any difficulties which he intimates would lie were the proposition one of first impression.¹¹ I must confess that the suggested difficulties have never impressed me. We start out with the technical re-

⁹ Wald's Pollock, 2 Am. ed., p. 12, note *m*.

¹⁰ Pollock, Contract, 8 ed., p. 191.

¹¹ Whether, in any given case, there is a promise in law must be determined by the nature of the contemplated performance. For a discussion of this question see 8 HARV. L. REV. 30, 14 *id.* 496, 16 *id.* 319.

quirement of consideration, something which must be given in exchange for a promise in order that it shall exist in law. Suppose the consideration asked in the offer is an act. Then there can be no promise until the act is completed, even though there may be mutual assent. But suppose the act is a bond under seal. Then when the bond is delivered the offer ripens at once into a promise, but not an instant earlier. At that precise point the requested consideration is furnished. In that case, however, the bond is complete by itself, and comes into existence without consideration. Let us see whether this makes any difference. When a promise is demanded, we have in reality an act requested. This act consists in giving something to which the law will annex the obligation of promise. Unlike the bond, the promise, to exist, must have its consideration, which is to be the counter promise. The instant one utters words of such a character as to constitute a promise if the element of consideration is found, the person so speaking has done his part towards giving the act asked, and it simply remains for the law to annex its obligatory character to it. At that point both parties put themselves where the law can act upon them. There appears to be no logical difficulty in saying that the law operates simultaneously upon each and thereby transforms each action into a promise, each mutually dependent upon the other. In all cases there must be some instant at which the law takes effect. This is so in the case of any obligation. A bond becomes such at the instant of delivery. Prior to that it is a mere paper writing. So each promise becomes an obligation when the action of each party makes it possible for the law to act upon each.

There may be very marked differences in result, if consideration is looked upon as an incident in the contract after it has arisen, rather than as an essential to its existence. Once concede that the contract becomes an obligation without consideration, then there would seem to be no good reason why consideration may not be waived by the promisor, but as its presence is essential to the origin of the contract it is not within the power of the parties to do without it. The law refuses to annex the obligation of contract to acts of the parties which lack this essential element. For this reason estoppel is inapplicable. This is not because there may not be a contract, some elements of which are done away

with by acts which result in estoppel or something analogous thereto. For example, mutual assent is generally an essential element, in fact is the characteristic of contract, and yet contracts frequently arise in which there is no actual assent.

This is not true of consideration. The law as it has developed makes this particular requirement a necessity, which the parties cannot avoid. A gratuitous promise is not a contract. No one can waive the requirement of consideration because the law which affixes the obligation refuses to do so under such circumstances. Very true, this is peculiarly technical, and is by no means essential in its nature. But the rule is there, and no doctrine is more consistently enunciated than the one which says that consideration is requisite for a contract.

With such importance attached to a technical requirement of the law, it is not unreasonable for the lay public to ask for a scientifically accurate definition of the term "consideration." It is believed, however, that no satisfactory definition can be given. Deplorable as this may be, it seems nevertheless true. It is due to a lack of accurate legal terminology, which causes confusion when any form of words is used which attempts to explain. A definition to be of value should indicate within its own confines just what it describes. Otherwise it is certainly inaccurate, and may lead to erroneous conclusions. A distinguished authority on the law of contract¹² suggests this definition: "Any surrender of a legal right may be a consideration for a promise." This statement will strike anyone thoroughly familiar with the subject as accurate. But such person does not need any definition, and is not helped thereby. To anyone seeking knowledge, the above suggestion leaves him where he started. He may well inquire what is a "legal right." Can we define such right in a way that will prove a divining-rod, and certainly indicate in advance whether in any given case there exists such a legal right to be surrendered? In other words, this proposed definition simply substitutes one question for another and answers neither. Any attempt to define a legal idea is indeed a "perylous chose."

We still maintain as requisite a technicality existing simply

¹² Prof. T. D. Terry, 12 Col. L. Rev. 574.

because of its historical development, and involving such an important topic as contract. We envelop an obligation of everyday use with a legal rule, which is unnecessary, and which frequently works rank injustice. In view of this and other outgrown doctrines, it is not strange that the common-sense intelligence of the people leads them to regard law and lawyers with suspicion.

A technical rule, however harsh, is less objectionable if clearly understood and consistently applied. Men may shape their conduct to meet the requirement. But the doctrine of consideration is not so enforced. Neither courts nor thinking writers are willing to follow fearlessly wherever the rule may lead. Thus there seems to be no escape from possible injustice in certain cases where a unilateral contract is contemplated. Such an eminent authority as Sir Frederick Pollock refuses to follow the premises to their legitimate conclusion.¹³ It is inconceivable that the author does not understand the argument. Yet he attacks it by assuming other questions as involved, sets up an imaginary position as to acceptance, and then proceeds to knock down this rag baby of his own creation. If any one disapproves the result, why not recognize the force of the logic, and refuse to accept the rule on the simple ground that it works injustice?

After all these years of discussion and adjudication, well-trained lawyers are still in doubt as to fundamental questions concerning consideration. There is not even a full agreement as to what it is. I believe that an able judge might, by an authoritative statement, overrule the entire doctrine, and declare that the common-law rule of consideration is not now enforced. This would require courage as well as an accurate knowledge of the subject. Such a bold course would be far preferable to any attempt to reach the same result by subterfuge, with talk about estoppel and the like. This indirect method only leads to confusion, doing more harm in the long run than it accomplishes possible good in the given case.

But if the courts will not bring about this result, the time has come when the legislature should act. This could be accomplished by a brief statute stating in accurate terms that the doctrine of consideration is abolished.

Clarence D. Ashley.

NEW YORK UNIVERSITY.

¹³ Pollock, *Contract*, 8 ed., p. 26, note (c); 28 *Law Quarterly Review*, p. 100.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President*.
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer*.
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,

FRANCIS S. WYNER.

COLLECTION OF BRIEFS IN THE LAW LIBRARY. — The board of student advisers has collected in a bound volume, now in the law-school library, all the briefs drawn up in the law clubs last year. A list of those submitted in the Ames Competition is found on page 466 of this Review. They were carefully prepared by second-year men at considerable length, and are at the service of lawyers who may be working on points of law similar to those involved.

DEFENSES TO ACTION ON FOREIGN JUDGMENT. — By the civil law a foreign judgment, in the absence of treaty or statutory provision, is reviewable on the merits. When approved it is declared executory and enforced directly.¹ At common law the rule is otherwise. A foreign judgment is conclusive on the merits, because it creates an obligation which is recognized like any other foreign-acquired right.² This doctrine,

¹ *Landesbrandcasse v. Assurances Belges*, 21 *Clunet* 164, 3 *Beale*, *Cases on Conflict of Laws*, 365; *Holker v. Parker*, 21 *Bulletin des Arrêts* 119, 3 *Beale*, *Cases on Conflict of Laws*, 357. See 1 *PIGGOTT*, *FOREIGN JUDGMENTS*, 9.

² *Bank of Australasia v. Nias*, 16 *Q. B.* 717; *Godard v. Gray*, *L. R.* 6 *Q. B.* 139; *Hampton v. McConnell*, 3 *Wheat. (U. S.)* 234. The Supreme Court of the United States has made an exception in the case of judgments rendered in foreign countries whose laws do not reciprocate. *Hilton v. Guyot*, 159 *U. S.* 113, 16 *Sup. Ct.* 139. In *Taylor v. Hollard*, [1902] 1 *K. B.* 676, the English court recognized a foreign judgment rendered in derogation of an English judgment. In some jurisdictions it is held that a foreign judgment is merely *prima facie* evidence of the cause of action for which it was rendered. *Tourigny v. Houle*, 88 *Me.* 406, 34 *Atl.* 158; *Taylor v. Barron*, 30 *N. H.* 78.

besides being consistent,³ is supported by the strongest considerations of expediency,⁴ and involves a wholesome recognition of the coördinate position of foreign courts.⁵ The enforcement of a foreign judgment, however, requires a new judgment.⁶

Most of the defenses to an action upon a foreign judgment practically amount to a denial of the existence of the judgment. If the judgment was rendered without any real judicial proceedings, such as the decree of an arbitrary power,⁷ or without going into the merits of the controversy, as in the case of a mere nonsuit,⁸ it will not be recognized as conclusive. Want of jurisdiction on the part of the foreign court is the obvious and common basis of attack.⁹ But it is not enough that the foreign court has made a mistake of procedure; there must be an absence of territorial jurisdiction by international law.¹⁰ By the better view a judgment based upon a penalty will not be enforced outside the state of its rendition.¹¹ A sovereign might refuse to enforce a foreign judgment on grounds of policy,¹² although this is impossible in the United States in the case of sister-state judgments because of the federal Constitution.¹³ But an obvious misinterpretation of the law of the forum will not prevent the enforcement of a foreign judgment.¹⁴ Moreover, it is well established that the mere fact that an appeal has been taken does not affect the binding nature of a judgment.¹⁵ Nor could the reversal of a judgment have any direct effect upon a foreign judgment even though the latter be based upon the reversed judgment.¹⁶ This would seem obvious in view of the common-law conception of judgments as newly created rights.

In a recent New York case, however, the court considered the reversal of a Wisconsin judgment a defense to a California judgment based upon the reversed Wisconsin judgment. *Ellis v. Delafield*, 153 N. Y. App. Div. 26. The result may be properly reached only on the ground that the reversal of the Wisconsin judgment afforded an equitable de-

³ See 22 HARV. L. REV. 51.

⁴ See STORY, CONFLICT OF LAWS, § 607.

⁵ See 1 PIGGOTT, FOREIGN JUDGMENTS, 340, 355 ff.

⁶ *McElmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501. It seems unscientific to enforce one right by creating another independent right of equal dignity. For a discussion of the doctrine of merger, see 26 HARV. L. REV. 375.

⁷ *Sawyer v. Maine Fire and Marine Ins. Co.*, 12 Mass. 291.

⁸ *Hans v. Tierman*, 53 Pa. St. 192.

⁹ *Buchanan v. Rucker*, 9 East 192.

¹⁰ *Pemberton v. Hughes*, [1899] 1 K. B. 781.

¹¹ *State of Arkansas v. Bowen*, 20 D. C. 291; *Addams v. Worden*, 6 L. C. 237. *Contra*, *Spencer v. Brockway*, 1 Oh. 259.

¹² *Cf. Kaufman v. Gerson*, [1904] 1 K. B. 591.

¹³ *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641.

¹⁴ *Godard v. Gray*, *supra*; *Fauntleroy v. Lum*, *supra*.

¹⁵ *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411; *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45.

¹⁶ *State v. Tillotson*, 85 Kan. 577, 117 Pac. 1030. See *Parkhurst v. Berdell*, 110 N. Y. 386, 392, 18 N. E. 123, 125-126. See *Merchants' Ins. Co. v. De Wolf*, 33 Pa. St. 45, 46. It seems that in such a case, the court may vacate the judgment on motion even after the term at which it was rendered, contrary to the general rule at common law. See *Heckling v. Allen*, 15 Fed. 196, *Merchants' Ins. Co. v. De Wolf*, *supra*. *Cf. Aetna Ins. Co. v. Aldrich*, 38 Wis. 107, 110-111.

fense, and was admissible at law under the reformed code of procedure.¹⁷ The jurisdiction of equity to restrain a party from enforcing a judgment is undoubted.¹⁸ Although the California judgment created a new right, it was based upon a presupposition that has failed, so that it would be unconscionable to enforce the right. Relief by direct proceeding in California is clearly inadequate under the circumstances. Moreover, the defense is not open to the practical objection that it involves a reopening of the California judgment on the merits. Hence the New York court might well exercise its equitable power to modify the legal situation as is commonly done in the case of mortgages. The precise manner of accomplishing the result, being a matter of procedure, is governed by the law of the forum. Thus fraud, although no legal defense to a judgment,¹⁹ may be a reason for restraining its enforcement, and in jurisdictions allowing equitable defenses at law, may be set up in an action upon the judgment.²⁰

THE EFFECT OF CHANGING THE USE OF LAND TAKEN BY EMINENT DOMAIN. — Statutes conferring the power of eminent domain are strictly construed because the exercise of the power involves a compulsory taking of private property.¹ In the absence of clear language authorizing the taking of a greater interest, the interest which may be taken is a right to use the land for the public purpose specified,² and upon abandonment of this use the title of the original owner is unincumbered as before the condemnation.³ The nature of the interest which may be condemned is a question for the legislature,⁴ and a fee simple will pass to the person exercising the power if the statute so provides.⁵ In such a case the original owner has no further interest in the land. He cannot

¹⁷ See N. Y. CODE CIV. PROC., § 507; *Foot v. Sprague*, 12 How. Pr. (N. Y.) 355.

¹⁸ *Pearce v. Olney*, 20 Conn. 544.

¹⁹ *Christmas v. Russell*, 5 Wall. (U. S.) 290; *Mooney v. Hinds*, 160 Mass. 469, 36 N. E. 484.

²⁰ *Ward v. Quinlivan*, 57 Mo. 425; *Levin v. Gladstein*, 142 N. C. 482, 55 S. E. 371.

¹ *Washington Cemetery v. Prospect Park & Coney Island R. Co.*, 68 N. Y. 591. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 449.

² *Washington Cemetery v. Prospect Park & Coney Island R. Co.*, *supra*; *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. Ordinarily this right is called an easement. Proprietors of Locks and Canals on Merrimack River v. Nashua & Lowell R. Co., 104 Mass. 1. See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 810. Where, as in the ordinary case, right to possession of the land is given, as where a railroad company condemns land for a right of way, some courts have held that this interest is not properly an easement, but is corporeal in its nature. *Pennsylvania Schuylkill Valley R. v. Reading Paper Mills*, 149 Pa. St. 18, 24 Atl. 205; *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. 133. These courts agree, however, that the original owner can restrain an unauthorized use of the land and that the land reverts to the original owner on abandonment of the use for which it was taken. *Lance's Appeal*, 55 Pa. St. 16; *Lazarus v. Morris*, 212 Pa. St. 128, 61 Atl. 815.

³ *Chambers v. Great Northern Power Co.*, 100 Minn. 214, 110 N. W. 1128; *McCombs v. Stewart*, 40 Oh. St. 647.

⁴ *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325.

⁵ *Heyward v. Mayor, etc. of New York*, 7 N. Y. 314. *Contra*, *Kellog v. Malin*, 50 Mo. 496.

complain if the land is put to a private use even though, as against the state, this use be wrongful,⁶ and there is no right of reversion in him if the use for which the land was taken is abandoned.⁷

An interesting question arises when land condemned under a statute which gives only the right to use the land is afterwards put to a different public use from that for which it was condemned. In a recent Nebraska case the defendant's assignor condemned the right to flood the plaintiff's land for a grist mill. An electric-light plant was later substituted for the grist mill. The court refused to enjoin the flooding of the plaintiff's land for the electric-light plant, provided the defendant pay for such damage, if any, as was caused by the operation of the electric-light plant over and above the damage which would have been caused by running the grist mill. *Lucas v. Ashland Light Mill & Power Co.*, 138 N. W. 761 (Neb.). Certainly it seems a hardship if the defendant must pay over again for a new use which is no more burdensome than the old one. Such hardship seems to have had weight with the Ohio court in a similar case.⁸ It is difficult, however, to escape the conclusion elsewhere reached, that by the substitution of a new use for the old one, the old use is abandoned and the land reverts free to the original owner.⁹ It would follow that in a proceeding instituted subsequently the owner would be entitled to full compensation as for the use of unincumbered land.¹⁰ If, however, before the old use is abandoned the legislature provides that land used for one public purpose be put to a different public use, the imposition of the new use effects relief from the burden of the old, and this should be taken into account in determining the compensation to be made for such imposition. Accordingly in such a case payment for the damage caused by the change in use would seem sufficient.¹¹ The same reasoning would apply where a new use is condemned under a general power of eminent domain before the old use is abandoned.

It is sometimes said that the legislature can authorize a change from one public use to another public use of a kindred nature without compensating the owner.¹² But the land cannot be subjected to additional

⁶ *Currie v. New York Transit Co.*, 66 N. J. Eq. 313, 58 Atl. 308; *Hamilton v. Annapolis & Elk Ridge R. Co.*, 1 Md. Ch. 107.

⁷ *Malone v. City of Toledo*, 34 Oh. St. 541; *Rexford v. Knight*, 11 N. Y. 308.

⁸ *Hatch v. Cincinnati & Indiana R. Co.*, 18 Oh. St. 92.

⁹ *Pittsburg & Lake Erie R. Co. v. Bruce*, 102 Pa. 23; *Heard v. City of Brooklyn*, 60 N. Y. 242.

¹⁰ The decisions in *Hatch v. Cincinnati & Indiana R. Co.*, *supra*, and the principal case cannot be supported on the ground that the subsequent use was in reality not a new use, for in such a case no damage at all should be awarded.

¹¹ *Murray v. County Commissioners of Berkshire*, 12 Met. (Mass.) 455. Cf. In the *Matter of the Village of Olean v. Steyner*, 135 N. Y. 341, 32 N. E. 9. In some jurisdictions compensation for the right taken is not allowed to be diminished by the benefits received from the imposition of the use. See 2 LEWIS, EMINENT DOMAIN, §§ 687-693. If in these jurisdictions the benefit conferred by the relief from the old use could not be deducted, it should at least be considered that the right taken is taken over land which is not unincumbered but which is at the time subject to the old use, in which case the damages would not usually be large. *Tufts v. City of Charleston*, 2 Gray (Mass.) 271.

¹² See *Curran v. City of Louisville*, 83 Ky. 628, 632, 633; *Chase v. Sutton Manufacturing Co.*, 4 Cush. (Mass.) 152, 167, 168.

burden by the legislature without compensation,¹³ and it is not perceived how it can be important that the new use is kindred to the old one if in fact it imposes a heavier burden. And if the new use imposes no greater burden on the land than the old one it would seem that compensation need not be made whether the new use be kindred to the old one or not.

REVISION OF ALIMONY DECREES. — Cases resulting in decrees for the payment of alimony form no exception to the general principle that what is once adjudicated is not to be retried.¹ Hence, in the absence of express reservation of the power to modify,² the decree conclusively determines the proper allowance under the then existing conditions and a revision can proceed, if at all, only on new facts.³ Upon proper allegations of the changed circumstances of the parties, revision is ordinarily allowed in cases of divorce *a mensa et thoro*⁴ and in cases where alimony is granted without divorce.⁵ For in such cases the basis of the decree is merely the common-law right of the wife to support,⁶ the pecuniary value of which must necessarily vary with the circumstances of the parties. In absolute divorce, however, the marriage relation is terminated and the property rights incidental to it are destroyed.⁷ In such cases some courts have reasoned that the basis of the decree is not only the right to support, but also the loss of these property rights as to which the adjudication must be final,⁸ unless there is a statute⁹ expressly providing for a revision, or a reservation in the decree itself.¹⁰ A few other jurisdictions reach the same result on the doctrine, which would seem to be untenable, that the general rule forbidding the alteration of decrees applies to decrees for alimony even where there has been a substantial change in the circum-

¹³ State v. Laverack, 34 N. J. L. 201.

¹ Petersine v. Thomas, 28 Oh. St. 596; Fischli v. Fischli, 1 Blackf. (Ind.) 360. Of course, a decree for alimony, like other decrees, is subject to modification for fraud or mistake. Senter v. Senter, 70 Cal. 619, 11 Pac. 782; Gray v. Gray, 83 Mo. 106.

² In some states it is more or less the practice to make this reservation in the decree. See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875. Sometimes also the court orders a mere nominal alimony for the time being. See Lewsen v. Shotwell, 27 Miss. 630. These decrees, it has been urged, should not be construed as settling what the court intended they should not settle. See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875.

³ Parker v. Parker, 61 Ill. 369; Blythe v. Blythe, 25 Ia. 266.

⁴ Saunders v. Saunders, 1 Sw. & Tr. 72; Rogers v. Vines, 6 Ired. (N. C.) 293.

⁵ Anonymous, 1 Desauss. Eq. (S. C.) 112; Beck v. Beck, 43 N. J. Eq. 668.

⁶ Garland v. Garland, 50 Miss. 694; Trotter v. Trotter, 77 Ill. 510. Some courts, however, disregard this reason when they award alimony in marriages void *ab initio*. Strode v. Strode, 3 Bush (Ky.) 227. *Contra*, 34 W. Va. 524. In such cases there should be relief in tort. See 22 HARV. L. REV. 307.

⁷ See Barrett v. Failing, 111 U. S. 523, 525, 4 Sup. Ct. 598. See 2 NELSON, MARRIAGE, DIVORCE, AND SEPARATION, § 903. Cf. 16 HARV. L. REV. 521.

⁸ Petersine v. Thomas, *supra*. See 2 NELSON, MARRIAGE, DIVORCE, AND SEPARATION, §§ 903, 933 *a*.

⁹ Such statutes exist in Ark., Colo., Ga., Ill., Ia., Ky., Me., Mass., Mich., Minn., Miss., Mo., Neb., N. H., S. D., Vt., Wis. In some states revision is denied under a statute. Kerr v. Kerr, 59 How. Pr. (N. Y.) 255; Park v. Park, 18 Hun (N. Y.) 466.

¹⁰ There is an intimation that perhaps the terms of a decree of alimony may operate to exclude any future modification. See Hyde v. Hyde, 4 Sw. & Tr. 80, 81.

stances of the parties.¹¹ The weight of authority, however, is to the effect that even in cases of absolute divorce the decree can be reopened.¹² It is correctly pointed out that the decree is not intended as a final disposition of the property, but merely as an enforcement of the right to support;¹³ and that the rule relating to the finality of decrees is inapplicable to it, as to all decrees calling for action in the future.¹⁴

In jurisdictions allowing such revision, the question arises whether the same rule should obtain when the decree has incorporated an agreement of the parties. Such a question is, of course, purely academic in those few states which still insist that any agreement of the parties during the pendency of a divorce suit must be entirely disregarded by the court as against public policy in tending to facilitate divorce.¹⁵ Where the incorporation of such an agreement is allowed, the mere incorporation is sometimes held sufficient to eliminate the possibility of revision.¹⁶ Other courts deny revision on the more rational ground that such incorporation constitutes a recognition of it by the court and makes it binding, provided the married woman had capacity to contract.¹⁷ The soundest view, however, has been adopted, it would seem, by those courts which declare that the decree is not an enforcement of the agreement, but the court's own disposition of the question, which renders it subject to the court's ordinary power of modification.¹⁸ A recent Maryland case, while subscribing to this view, denies revision, nevertheless, on the ground that the agreement incorporated in the decree obviously undertook to give the wife something more than alimony. *Emerson v. Emerson*, 45 Chic. Leg. N. 122 (Circ. Ct. of Baltimore City). This refinement, however, would seem to be untenable. For, if the agreement is effective not as an agreement but as part of a decree, the intention of the parties becomes immaterial. Even if the court attempted to produce the same result as that intended by the parties, this decree, like all other decrees for alimony, necessarily includes a provision for support. Therefore since it is to be carried out in the future, it should be subject to the general principles justifying modification of such decrees.

ACTUAL COMPETITION AS AN ESSENTIAL ELEMENT IN UNFAIR TRADE CASES. — In modern times as trade has become more intricate the de-

¹¹ *Walker v. Walker*, 155 N. Y. 77, 49 N. E. 633; *Kamp v. Kamp*, *supra*.

¹² *Stevens v. Stevens*, 31 Colo. 188, 72 Pac. 1060; *Barbaras v. Barbaras*, 88 Minn. 105, 92 N. W. 522.

¹³ *Tolman v. Leonard*, 6 App. Cas. (D. C.) 224, 233. See PHELPS, JURIDICAL EQUITY, § 84.

¹⁴ *Keogh v. Pittston & Scranton St. Ry. Co.*, 195 Pa. St. 131; *Township of Erin v. Detroit & Erin Plank-Road Co.*, 115 Mich. 465.

¹⁵ *Cross v. Cross*, 58 N. H. 373; *Wilson v. Wilson*, 40 Ia. 230.

¹⁶ *Law v. Law*, 64 Oh. St. 369, 60 N. E. 560. See *Olney v. Watts*, 43 Oh. St. 499, 502, 3 N. E. 354, 356.

¹⁷ *Martin v. Martin*, 65 Ia. 255, 21 N. W. 595; *Henderson v. Henderson*, 37 Or. 141, 60 Pac. 597. On this line of reasoning it has been suggested that, following the analogy of separation agreements, it should be binding even though the wife had no capacity. See 21 HARV. L. REV. 146.

¹⁸ *Southworth v. Treadwell*, 168 Mass. 511; *Storey v. Storey*, 125 Ill. 608.

vices employed by dishonest traders to sell their goods by holding them out to the public as those of well-established manufacturers, have become more ingenious.¹ In order to protect the honest trader, courts of equity have steadily enlarged their jurisdiction.² Not many years ago relief would be refused unless infringement of a technical trade-mark could be shown.³ But the law came to recognize that there was property in a business reputation and that a "passing off" of one's goods as those of another by whatsoever means accomplished was a trespass upon this property. Thus a trader's name,⁴ his label,⁵ the distinctive dress of his goods,⁶ although not themselves property, are symbols of this good-will property, and as such are entitled to protection. Upon this principle it is now well settled that equity will enjoin the use of a trade name where the plaintiff and the defendant deal in precisely the same article.

A novel problem is presented, however, where the plaintiff's trade name is employed in order to sell more readily a commodity of the same general class as those produced by the plaintiff but of a particular variety in which he does not deal. The Circuit Court of Appeals has recently held that no ground for relief is afforded in such a case. *Borden's Condensed Milk Co. v. Borden's Ice Cream Co.*, 45 Chic. Leg. N. 121 (C. C. A., Seventh Circ.). The holding is based on the ground that the only instances where the use of a name not a trade mark has been enjoined are those where precisely the same product is sold. But the interposition of chancery in trade-name cases where there is actual competition is not explained by any unique doctrine. It is but an illustration of equity's

¹ See article by Edw. S. Rogers, 3 ILL. L. REV. 551; HOPKINS, UNFAIR TRADE, 1.

² Recovery at law for the infringement of a trade-mark seems to have been allowed in an action on the case prior to 1590. See *Southern v. How*, Poph. 143, 144. In 1742 Lord Hardwicke held that a court of equity could not enjoin an infringement of a trade-mark. *Blanchard v. Hill*, 2 Atk. 484. But by 1833 the law had so far advanced that in *Millington v. Fox*, 3 Myl. & C. 338, it was held that an injunction should issue even though an actual fraudulent intent could not be shown. In this country the first instance of equitable interposition to protect a trade-mark seems to have been in 1844. *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603. But the doctrine that equity could enjoin a trader from passing off his goods as those of another by means of any device whatsoever is of very recent origin. For some of the earliest cases see *Croft v. Day*, 7 Beav. 84 (1843); *Avery & Sons v. Meikle & Co.*, 81 Ky. 73 (1883); *Weinstock v. Marks*, 109 Cal. 529, 42 Pac. 142.

³ See *Stokes v. Landgraff*, 17 Barb. (N. Y.) 608 (1853); *Condee, Swon & Co. v. Deere & Co.*, 54 Ill. 439 (1870).

The distinction between a trade-mark and a trade name is often lost sight of by the courts. A technical trade-mark must be actually affixed to an article sent out into commerce. A generic descriptive or a geographical term cannot be a technical trade-mark. The fact that a trade-mark is not registered does not hinder it from being a valid trade-mark, nor is the converse true. A trade name on the other hand is the name employed in trade to designate a particular business, or a certain article of commerce; there are no restrictions as to the kind of name that may be employed. The same term frequently is a trade-mark as well as a trade name. See PAUL, TRADE-MARKS, § 160; BROWNE, TRADE-MARKS, 2 ed., §§ 91-141.

⁴ *Alligretti Chocolate Cream Co. v. Keller*, 85 Fed. 643; *Chickering v. Chickering & Sons*, 120 Fed. 69; *Walter Baker & Co. v. Sanders*, 80 Fed. 889.

⁵ *Kronthal Waters v. Becker*, 137 Fed. 649; *Kostering v. Seattle Brewing & Malting Co.*, 116 Fed. 620.

⁶ *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, 168 Mass. 154, 46 N. E. 386; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000.

protection of property from irreparable injury occasioned by unfair business methods or practices. That this injury is threatened even in the absence of direct competition seems clearly demonstrable. The purchasing public will hardly know how many different products belonging to the same general class the owner of a valuable trade name may prepare and sell under that name. Surely the widespread belief that a trader sells a faulty, fraudulent, or even mediocre article would injure his business reputation and good will.⁷ It is also evident that the plaintiff has acquired a good will in goods of the same class as those he sells but of a different variety; and that this will not be available to him, for sale to others, or if he subsequently desires to add that particular variety to his general line. It seems a short step for equity to extend protection to this property.⁸

Furthermore, this is not in substance an extension of the existing law.⁹ In cases involving technical trade-marks it is now generally held that a trade-mark used on one article cannot be appropriated by the maker of another article belonging to the same genus.¹⁰ Now the modern tendency is not to differentiate with nicety between a trade-mark and a trade name, but in every case to consider whether injury has been done to the plaintiff's property in good will.¹¹ Therefore it may well be argued that these trade-mark cases should be not merely close analogies but governing authorities.¹²

In cases where a defendant has not yet begun to use the disputed

⁷ In cases involving imitation of a trade-mark this deception of the public has been held to occasion damage. See *American Tobacco Co. v. Polacsek*, 170 Fed. 117; *Carroll v. Ertheiler*, 1 Fed. 688; *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535; *Bass v. Feigenspan*, 96 Fed. 206.

Nor should the excellence or genuineness of the defendant's commodity prevent the interference of equity, because the defendant has no right to subject the plaintiff to the danger of future deterioration in the quality of goods over which he has no control. In the analogous trade-mark cases the relative merit of the counterfeit article is not inquired into. See cases cited *supra*.

⁸ This element of damage has been taken into account where the passing off was accomplished by means of an imitation of a trade-mark. *Collins v. Oliver Ames & Sons Corporation*, 18 Fed. 561. But see *Celluloid Manufacturing Co. v. Reed*, 47 Fed. 712.

⁹ In an English case where the plaintiffs had sold cameras that could be attached to bicycles under the trade name of Bicycle Kodak cameras, the defendants were restrained from selling bicycles under the name of Kodak bicycles. *Eastman Photographic Materials Co., Ltd., v. John Griffith Cycle Corporation, Ltd.*, 15 R. P. C. 105. See also *Eno v. Dunn*, 15 App. Cas. 252. But cf. *Joseph Lucas, Ltd., v. Fabry Automobile Co., Ltd.*, 23 R. P. C. 33.

¹⁰ In trade-mark cases the following commodities have been held to be in the same class: cigarettes and smoking tobacco, *American Tobacco Co. v. Polacsek*, 170 Fed. 117; muslin and shirts made out of muslin, *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535; liniment and medicated soap, *Omega Oil Co. v. Weschler*, 35 N. Y. Misc. 441, 71 N. Y. Supp. 983. There have been cases on this very point which the courts in their anxiety to do equity have termed trade-mark cases when in fact there was only a question of "unfair trade" involved. See *Amoskeag Manufacturing Co. v. Garner*, 54 How. Pr. (N. Y.) 297; *Collins v. Oliver Ames & Sons Corporation*, 18 Fed. 561. See *Browne, Trade-Marks*, 2 ed., § 67.

¹¹ See *HOPKINS, UNFAIR TRADE*, I, 23, 28; *HESELTINE, LAW OF TRADE-MARKS AND UNFAIR TRADE*, xlv; *PAUL, TRADE-MARKS*, § 23.

¹² Within this rule goods might be said to be in the same class whenever the use of a symbol would enable an unscrupulous dealer to pass off spurious goods upon purchasers as genuine goods made by a well-known dealer.

trade name the arguments in favor of the interference of equity seem doubly cogent. To refuse relief may cause the plaintiff irreparable injury, while granting the injunction works no forfeiture upon the defendant, since under any other name the true merits of his wares will as well appeal to the public.

EFFECT ON INCOMPLETE RELEASE OF APPOINTMENT OF DEBTOR AS EXECUTOR. — Where an incomplete transaction *inter vivos* presents clear evidence of an intention to make a gift or to release a debtor, the English courts in general have held that the appointment of the intended donee or debtor as executor perfects the gift or release.¹ The vesting of the legal title to the estate in the executor is considered to supply the necessary legal formalities and to complete the transaction. But to deal adequately with the problem it is necessary to examine more closely the principles upon which this result may be reached in each of the two types of cases.

The testator's will at his death gives the legal title of all his personal property to his executor in trust for the fulfilling of certain duties. Under the early law the executor was presumed to take an absolute property in the residue.² Later it was provided by statute in England that it should be conclusively presumed that the executor take no beneficial interest, but hold any residue in trust for the next of kin or residuary legatee, and this presumption could be rebutted only by evidence on the face of the will.³ It is submitted that under such a statute, the effect of making the intended donee executor would not be to complete the gift, since a contrary intent is implied into the will by what is in effect a statutory rule of construction.⁴ In America a similar result would probably be reached, even in the absence of a specific statute, by a construction of the will itself.⁵

¹ *Strong v. Bird*, L. R. 18 Eq. 315 (release); *In re Applebee*, [1891] 3 Ch. 422 (release); *In re Griffen*, [1899] 1 Ch. 408 (release); *In re Stewart*, [1908] 2 Ch. 251 (gift of bonds). *Contra*, *In re Hyslop*, [1894] 3 Ch. 522 (release); *Battle v. Knocker*, 46 L. J. Ch. 159 (gift of a house). *Cf.* early cases, *Byrn v. Godfrey*, 4 Ves. 5 (accord); *Wekett v. Raby*, 2 Bro. P. C. 386 (*contra*); *Brown v. Selwin*, 3 Bro. P. C. 607 (*contra*). *Cf.* *Sibthorp v. Moxon*, 3 Atk. 579.

² The presumption that the executor took beneficially could not be defeated by parol evidence, to make him trustee of the residue for the next of kin. *White v. Williams*, 3 Ves. & B. 72. If, however, a non-conclusive contrary intention seemed to be shown on the will, parol evidence could be brought in to show the testator's real intention. *Walton v. Walton*, 14 Ves. 318; *Mallabar v. Mallabar*, Cas. t. Talb. 78. See STORY, EQUITY JURISPRUDENCE, 13 ed., § 1208, n. 1.

³ 11 GEO. IV. & 1 WM. IV., c. 40; *Love v. Gaze*, 8 Beav. 472.

⁴ *Battle v. Knocker*, *supra*. *Contra*, *In re Stewart*, *supra*. Where a residuary legatee is appointed, the use of parol evidence to deprive him of part of the residue would be clearly against the Wills Act.

⁵ See note 10, *infra*. The particular question under discussion does not seem to have arisen in America, but either by express statute, by construction of the Statute of Distribution, or by decision, the executor in most states must hold any residue in trust for the next of kin, and parol evidence would probably not be admitted to effect a different result. *Paup v. Mingo*, 4 Leigh (Va.) 163; *Hays v. Jackson*, 6 Mass. 148, 152; *Nickerson v. Bowly*, 49 Mass. 424, 431; *Hill v. Hill*, 2 Hayw. (S. C.) 298; *Dunlap v. Ingram*, 4 Jones Eq. (S. C.) 178; *Broome v. Alston*, 8 Fla. 307; *Chamberlin's Appeal*,

The question of the incomplete release is, however, different. Under the English law the appointment of a debtor as executor completely destroys the debt.⁶ This is based on the theory that as an executor cannot sue himself the legal liability is cut off, and a voluntary destruction of the liability destroys the whole chose in action. But equity considered that it was inequitable for the debtor to be excused from liability by what might be termed a legal accident. Therefore to carry out the probable intention of the testator which the law could not do, it forced the executor to hold an amount of his own property equal to the debt, in trust for the next of kin.⁷ Two questions then arise: (1) Will the fact that the testator would have desired the debt to be released prevent the raising of this equitable liability? (2) Does any rule of law exclude evidence of this fact?

In cases of resulting trusts, where evidence of a contrary intention can be admitted, the rise of the equitable duty or liability will be prevented.⁸ Again, where the legal liability of a debtor is released by the destruction of a specialty, an equitable liability will arise unless it appears that the act was accompanied by an intent to release the debtor. Since equity in the facts under discussion raises a trust, as an aid to the law, only for the purpose of carrying out what probably would have been the intention of the testator, it does not seem illogical from these analogies that equity should refuse to raise a trust if it can be shown that the testator would have intended otherwise.⁹ It is clear that no actual intent appears on the face of the will, from the mere appointment of an executor, that he hold a part of his own property in trust for the next of kin.¹⁰ Nor is there any statutory rule of construction which implies this intention from the appointment.

It is clear also that the admission of evidence of this intention does not give effect to a parol testamentary disposition. The asset to which it indirectly relates has been destroyed as the legal result of the debtor's

70 Conn. 363, 39 Atl. 734; *Linnott v. Kenaday*, 14 App. Cas. (D. C.) 1; *Wilson v. Wilson*, 3 Binney (Pa.) 557.

⁶ *Wankford v. Wankford*, 1 Salk. 299. See *Nedham's Case*, 8 Co. 135, 136. See WOERNER, *AMERICAN LAW OF ADMINISTRATION*, § 311; WILLIAMS, *EXECUTORS*, 7 Am. ed., 624 *et seq.*

⁷ *Carey v. Goodinge*, 3 Bro. C. C. 110; *Freakley v. Fox*, 9 B. & C. 130; *Berry v. Usher*, 11 Ves. 87.

⁸ *Mallabar v. Mallabar*, Cas. t. Talb. 78; *Benhow v. Townsend*, 2 L. J. Ch. 215; *Jackson v. Feller*, 2 Wend. (N. Y.) 465.

⁹ While the attempt to release the debt before death is not much evidence that the testator intended the will to operate as a release, yet it is evidence that he would not have intended the debtor to pay his debt to the next of kin.

¹⁰ It is true that the use of certain words is considered to imply the intent to accomplish a particular legal effect. And in England by rules of construction parol evidence to prove that some other effect was intended is not always admissible. For instance, it cannot be shown that an express trustee was intended to take beneficially. *Croome v. Croome*, 59 L. T. R. 582. And the same reasoning is likely in America to exclude evidence that property, passed directly to an executor by his appointment, is not intended to be held in trust. On the other hand, when A. pays B. for a conveyance from B. to C., a resulting trust arises for A., but may be rebutted by evidence of a contrary intent. *Jackson v. Feller*, 2 Wend. (N. Y.) 465. In the facts under discussion the equitable liability is not attached to any property passed by the will but to the executor's own estate. It is difficult to imply merely from the words appointing an executor any actual intention that this new debt shall arise in equity.

becoming executor. This evidence then merely proves circumstances which may or may not impose an equitable liability on the executor's estate and would therefore seem admissible. The decision in a recent English case, that the appointment of the debtor as executor after an ineffective release *inter vivos* extinguishes the debt, seems therefore sound. *In re Pink*, [1912] 2 Ch. 528.¹¹

THE DOMICILE OF A WIFE. — At common law, a husband and wife were considered as a single legal unit. Being but one unit they had but one domicile, which was that of the husband.¹ In the main this theory persists to-day, but certain modifications of the rule have been made in connection with divorce. Since only the domiciliary sovereign can dissolve a marriage,² a wife at common law would be required to sue for a divorce at her husband's domicile, no matter to what place he may have removed it.³ As a relief from this manifest injustice, the wife is allowed to have a separate domicile for the purpose of securing a divorce. The rule which prevails in most American jurisdictions is that the wife may establish a separate domicile for this purpose wherever she resides *animo manendi*, providing she has a good cause for divorce.⁴ A few courts hold that this separate domicile can only be established in the same jurisdiction as the last matrimonial domicile.⁵ On the other hand, English courts have adhered more closely to the common-law rule and have required the wife to sue for divorce at her husband's domicile;⁶ but they allow her to sue at the last matrimonial domicile when the husband left it in order to deprive her of this right, on the theory that the husband's act is a fraud on the wife and that he cannot be allowed to take advantage of his own wrong.⁷

The idea that the wife's domicile may depend on acts of the husband having no connection with the cause of divorce is extended even further in a recent English case. A marriage occurred in England between an Englishwoman and a domiciled Greek, but no matrimonial domicile was established anywhere. The marriage was annulled in Greece on the ground

¹¹ *Strong v. Bird*, *supra*; *In re Applebee*, *supra*; *In re Griffen*, *supra*. *Contra*, *In re Hyslop*, *supra*. By statute and decision in many American jurisdictions the debt is not extinguished at law, by the appointment of the debtor as executor. It would still be a legal asset, therefore, and parol evidence could not be brought in to affect its disposition. See WOERNER, AMERICAN LAW OF ADMINISTRATION, § 311; 2 WILLIAMS, EXECUTORS, 6 Am. ed., 1488 *et seq.*

¹ See 1 BL. COMM. 442.

² *Wilson v. Wilson*, 2 P. D. 435; *State v. Armington*, 25 Minn. 29; *People v. Dawell*, 25 Mich. 247.

³ See WHARTON, CONFLICT OF LAWS, 3 ed., § 224.

⁴ *Ditson v. Ditson*, 4 R. I. 87; *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806; *Smith v. Smith*, 43 La. Ann. 1140, 10 So. 248.

⁵ See *Burtis v. Burtis*, 161 Mass. 508, 511, 37 N. E. 740, 741; *Haddock v. Haddock*, 201 U. S. 562, 570, 26 Sup. Ct. 525, 527. This rule is followed in European countries. See WHARTON, CONFLICT OF LAWS, 3 ed., 445, n. 2.

⁶ *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Tollemache v. Tollemache*, 1 Sw. & Tr. 577; *Wilson v. Wilson*, L. R. 2 P. D. 435.

⁷ See *Deck v. Deck*, 2 Sw. & Tr. 90. This rule seems to confer only a right to sue at the last matrimonial domicile. *Le Sueur v. Le Sueur*, 1 P. D. 139.

that no Greek priest had been present at the ceremony. The wife, having returned to England, sued for a divorce, and the court assumed jurisdiction on the ground that, since the husband had taken an adverse advantage of his domicile, the wife reverted to her domicile of origin.⁸ *Stathatos v. Stathatos*, 57 Sol. J. 114, 29 T. L. R. 54 (Eng., P. D., Nov., 1912). Although it is difficult to see how the husband took an adverse advantage of his domicile when he merely obeyed the law of his sovereign, the result would be easily reached by the sounder theory of the American courts. Theoretically, the right of a wife to obtain a separate domicile should depend upon her living in a place *animo manendi* and her legal capacity to acquire a different domicile from her husband's. It is submitted that she has such a capacity when she is not under a legal duty to live with him, and she is relieved from this duty when she has a good cause for divorce. It would seem that a court must primarily decide whether or not she has a good cause for divorce.⁹ Therefore the husband's actions should only affect the question of the wife's domicile if they in themselves supply cause for a divorce.

Although she have cause for divorce, a wife's right to have a separate domicile is not absolute. It has been held that if she unreasonably delays in suing for divorce her right of action is destroyed, so that her separate domicile seems conditioned upon her petitioning for divorce within a reasonable time.¹⁰ Moreover, it is doubtful if she can have this separate domicile for any purpose other than divorce. In no other case do strong practical considerations exist as in the case of divorce, which would justify a departure from the historical rule that every incident of the marriage continues as long as the status itself. It does not seem unreasonable to make other rights depend on the termination of that status.¹¹

⁸ The suggestion that the wife's domicile of origin revived might lead to most undesirable results, as for instance if her domicile happened to be in Australia. It may be doubted whether the court uses the expression "domicile of origin" in its literal sense, or merely means the domicile which the wife had immediately preceding the marriage. The court relies upon a *dictum* in *Ogden v. Ogden*, in which Sir Gorrel Barnes uses the expression "original domicile," and the context seems to indicate that he meant the domicile preceding marriage. See *Ogden v. Ogden*, [1908] P. D. 46, 82.

⁹ *Suter v. Suter*, 72 Miss. 345, 16 So. 673. See *Cheely v. Clayton*, 110 U. S. 701, 705, 4 Sup. Ct. 328, 330; *Hood v. Hood*, 11 Allen (Mass.) 196, 199; *Loker v. Gerald*, 157 Mass. 42, 45, 31 N. E. 709, 710. The result of these cases seems to make the fact as to whether or not the wife has a good cause of divorce a jurisdictional question. *Contra*, *Johnson v. Johnson*, 57 Kan. 343, 46 Pac. 700. However, it is only when the decision of one court is attacked in another jurisdiction that this question would be squarely in issue.

¹⁰ *Beauckerk v. Beauckerk*, [1891] P. D. 189; *Smith v. Smith*, 43 N. H. 234; *Barker v. Barker*, 63 N. J. Eq. 593, 53 Atl. 4.

¹¹ *Re Wickes*, 128 Cal. 270, 60 Pac. 867. But most of the few decisions upon this point are contrary to the view here expressed, two of three cases holding that a wife's will may be probated in her separate domicile, and another deciding that this gives her such diversity of citizenship as to entitle her to sue in the federal courts. *Shute v. Sargent*, 67 N. H. 305; *Matter of Florance*, 54 Hun (N. Y.) 328; *Watertown v. Greaves*, 112 Fed. 183. The reasoning of these cases, it is submitted, is unsound.

RECENT CASES.

AGENCY — PRINCIPAL'S LIABILITY TO THIRD PERSONS IN TORT — FRAUD: LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT COMMITTED FOR BENEFIT OF AGENT. — The defendant's clerk, who conducted the defendant's conveyancing business without supervision, fraudulently induced the plaintiff to convey her property to him, and then disposed of the property for his own benefit. *Held*, that the defendant is liable. *Lloyd v. Grace, Smith, & Co.*, [1912] A. C. 716.

The House of Lords in this case overrules the former English doctrine that a principal is not liable for the fraud of an agent unless benefited by the fraud. *British Mutual Banking Co. v. Charmwood Forest Ry. Co.*, 18 Q. B. D. 714. See *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439, 446; *Whitechurch v. Cavanagh*, [1902] A. C. 117, 141. The American cases make no such requirement. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36; *McCord v. Western Union Tel. Co.*, 39 Minn. 181. The principal's liability for contracts made by his agent has never been thus limited. *Hambro v. Burnand*, [1904] 2 K. B. 10; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262. The principal case, in assimilating the fraud cases to the contract cases, correctly decides that the motive of the agent, which is material in creating other tort liability, has here no logical bearing. The fundamental question as to which of the two innocent parties should bear the loss should be resolved against the principal when the defrauded party has dealt with an agent, and his acts are of the very kind which he is employed to do.

BILLS AND NOTES — PAYMENT AND DISCHARGE — MAKER NOT DISCHARGED BY INDORSER'S PAYMENT TO INDORSEE. — The indorser of a note paid the full amount of the note to the indorsee. The latter retained possession of the instrument, and subsequently sued the maker. *Held*, that he can recover the full amount of the note. *Bierce v. State National Bank*, 127 Pac. 856 (Okla.).

The acceptor of a bill is not discharged by the drawer's payment to the indorsee. *Jones v. Broadhurst*, 9 C. B. 173; *Bank of Montreal v. Armour*, 9 U. C. C. P. 401. *Contra*, *Bacon v. Searle*, 1 H. Bl. 88. Most of the few cases where the instrument is a note properly follow the bill cases. *Madison Square Bank v. Pierce*, 137 N. Y. 444; *Bank of America v. Senior*, 11 R. I. 376. The drawer or indorser, upon payment to the indorsee, can obtain the instrument and hold the acceptor or maker on it, as such payment is not an extinguishment. *Callow v. Lawrence*, 3 Maule & S. 95; *Hartzell v. McClurg*, 54 Neb. 316, 74 N. W. 626. Therefore the indorsee, when he retains and sues on the instrument, is simply enforcing the drawer's or indorser's rights. Hence he holds the money recovered in trust for the drawer or indorser. See *Cook v. Lister*, 13 C. B. N. S. 543, 591; *Thornton v. Maynard*, L. R. 10 C. P. 695, 698. To cases where the person who pays the indorsee is an accommodated party this reasoning is of course inapplicable. See *Madison Square Bank v. Pierce*, *supra*, 450; *Cook v. Lister*, *supra*, 591.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — DIVORCE DECREE AT MATRIMONIAL DOMICILE ENTITLED TO FULL FAITH AND CREDIT. — A wife deserted her husband in the state where they had a matrimonial domicile and went to another jurisdiction. The husband procured a divorce in the court of his state. Later the wife brought an action for divorce and alimony in the jurisdiction to which she had fled. In this action the husband pleaded the

divorce decree given at the matrimonial domicile. The plaintiff demurred to the plea. *Held*, that the demurrer should be overruled. *Thompson v. Thompson*, 226 U. S. 551, 33 Sup. Ct. 129.

The court reaffirms the doctrine established by its former decisions, that a divorce decree is entitled to full faith and credit only when it is given by the state of the matrimonial domicile, or when personal service is made upon the party not domiciled within the jurisdiction making the decree. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544; *Cheever v. Wilson*, 9 Wall. (U. S.) 108. See *Haddock v. Haddock*, 201 U. S. 562, 567, 26 Sup. Ct. 525, 526. But the decision in the principal case would be reached upon any of the theories of divorce jurisdiction adhered to in other courts. *Cf. Larquie v. Larquie*, 40 La. Ann. 457, 4 So. 335; *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517. See 19 HARV. L. REV. 586; 21 *id.* 296.

CONFLICT OF LAWS — JURISDICTION FOR DIVORCE — SEPARATE DOMICILE OF WIFE. — A Greek, domiciled in his native country, married an Englishwoman at her domicile in England. No matrimonial domicile was ever established. A Greek court annulled the marriage because the ceremony was not performed in the presence of a Greek priest, as required by the laws of Greece. The husband married again, and the wife, having returned to live in England, sued for a divorce. *Held*, that the divorce will be granted. *Stathatos v. Stathatos*, 57 Sol. J. 114, 107 L. T. R. 592, 29 T. L. R. 54 (Eng., P. D., 1912). See NOTES, p. 447.

CONFLICT OF LAWS — RECOGNITION OF FOREIGN JUDGMENTS — REVERSAL OF JUDGMENT AS DEFENSE TO JUDGMENT BASED UPON REVERSED JUDGMENT. — In an action in New York on a Wisconsin judgment, the defendant set up a California judgment by way of counterclaim. The California judgment was based upon a reversed Wisconsin judgment. The plaintiff had obtained an order vacating the California judgment, but the validity of this order was questionable. *Held*, that the reversal of the Wisconsin judgment is a defense to the California judgment based upon it. *Ellis v. Delafield*, 153 N. Y. App. Div. 26. See NOTES, p. 437.

CONSTITUTIONAL LAW — PERSONAL RIGHTS: RELIGIOUS LIBERTY — CONSTITUTIONALITY OF FEE TO SUPPORT CHRISTIAN ASSOCIATION IN STATE COLLEGE. — The board of regents of a state college in Oklahoma required, as a condition precedent to admission, the payment of a fee, part of which was devoted to the maintenance of a Young Men's Christian Association. The state constitution provided that "No public money . . . shall ever be appropriated, . . . directly or indirectly, for the use, benefit or support of any sect, church, denomination, or system of religion. . . ." *Held*, that the requirement of the fee is unconstitutional. *Connell v. Gray*, 127 Pac. 417 (Okla.).

The Young Men's Christian Associations, having for their avowed purpose the spread of Christianity and a membership test based on belief in orthodox Christian principles, seem well within the constitutional provision prohibiting public support to any "system of religion." Requiring a fee to support such organizations as a condition precedent to matriculation seems a clearer constitutional violation than Bible reading in public schools, which under similar provisions has been held unlawful. *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251. Other cases apparently opposed to these declare exercises based on the Bible lawful when unaccompanied by comment, and non-compulsory, but these were decided under constitutions whose provisions were much less comprehensive than the one in the principal case. *Moore v. Monroe*, 64 Ia. 367, 20 N. W. 475; *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250.

CORPORATIONS — DIRECTORS — LIABILITY OF DIRECTORS FOR EXCESSIVE SALARIES PAID TO THEMSELVES AND OTHER EMPLOYEES. — The directors of a corporation paid an extra nine per cent dividend to all stockholders who were employees. The dividends were regarded by the court as additional salaries. The directors showed no satisfactory reason for such a discrimination in salaries or dividends. The plaintiff, a minority stockholder, brought a representative action against the directors to recover for the corporation the money thus expended. *Held*, that the directors are liable for the extra salaries paid to themselves, but not liable for the sums paid to other employees. *Godley v. Crandall & Godley Co.*, 48 N. Y. L. J. 1651 (N. Y. App. Div., Dec., 1912).

The directors of a corporation have no power to vote themselves salaries. *Mallory v. Mallory Wheeler Co.*, 61 Conn. 131; *Butts v. Wood*, 37 N. Y. 317. If they appropriate salaries so voted it is clear that a stockholder may maintain a representative action against them to recover the money for the corporation. *Jacobson v. The Brooklyn Lumber Co.*, 184 N. Y. 152, 76 N. E. 1075; *Eaton v. Robinson*, 18 R. I. 396, 27 Atl. 595. Furthermore, a director who permits his subordinates to misappropriate corporate funds is personally responsible for their peculations. *Latimer v. Veader*, 20 N. Y. App. Div. 418, 46 N. Y. Supp. 823. So is a director who wilfully or negligently permits an exorbitant salary to be paid to a relative whom he has induced the corporation to employ. *Mutual Life Ins. Co. v. McCurdy*, 118 N. Y. App. Div. 815, 827, 103 N. Y. Supp. 829, 837. *Cf. Doe v. Northwestern Coal and Transportation Co.*, 78 Fed. 62. Or a director who pays an officer for past services, performed for another consideration already given. *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530. The principal case presents an analogous situation. If the dividends are "extra salaries" for the directors, they must be "extra salaries" for the other stockholding employees. No corresponding addition in the quality or quantity of work is received by the corporation in return. Clearly such payments by the directors are a breach of their fiduciary duty for which also they should be held personally liable. See 25 HARV. L. REV. 553.

CORPORATIONS — JURISDICTION OF EQUITY TO INTERFERE WITH INTERNAL MANAGEMENT OF FOREIGN CORPORATION. — A director of a foreign corporation filed a petition for a mandamus to compel his fellow directors to permit his inspection of certain books of the company. The residence of the parties and the office where the books were kept were in the local jurisdiction. *Held*, that a mandamus will issue. *Machen v. Machen & Mayer Electrical Mfg. Co.*, 85 Atl. 100 (Pa.).

The rule has often been stated that, although the parties and the subject matter may be before the court, equity has no jurisdiction where the internal affairs of a foreign corporation are in question. *Condon v. Mutual Reserve Fund Life Association*, 89 Md. 99, 42 Atl. 944; *Taylor v. Mutual Reserve Fund Life Association*, 97 Va. 60, 33 S. E. 385. This rule seems to be approved in the principal case as a necessary qualification to granting the relief desired. Admittedly such an assumption of internal control as appointing a receiver is exclusively within the jurisdiction of the home court, since the state which created may alone dissolve. *Parks v. United States Bankers' Corporation*, 140 Fed. 160; *Stafford & Co. v. American Mills Co.*, 13 R. I. 310. The reasons for the broad statement of the doctrine, however, seem confined to public expediency. See *Howell v. Chicago & North Western Ry. Co.*, 51 Barb. (N. Y.) 378; *State ex rel. Watkins v. North American, etc. Co.*, 106 La. 621, 631, 31 So. 172, 178. Under the broad rule a just claim may be defeated by a purely formal argument. But the jurisdiction of equity, where both parties are before the court, to decree the conveyance of foreign land has been generally conceded. *Gardner v. Ogden*, 22 N. Y. 327; *Penn v. Lord Baltimore*. 1 Ves. Sr. 444; *McGee*

v. *Sweeney*, 84 Cal. 100, 23 Pac. 1117. Furthermore, a recent tendency of equity jurisdiction is to permit decrees to operate even affirmatively in another state, whenever the substantial rights of the parties so require. *Rickey Land & Cattle Co. v. Miller*, 218 U. S. 258, 31 Sup. Ct. 11; *California Development Co. v. New Liverpool Salt Co.*, 172 Fed. 792. Where the local court can render an effective decree, it is submitted that the rule in question should be no bar to granting the relief. *State ex rel. Watkins v. North American, etc. Co.*, *supra*.

CRIMINAL LAW — ATTEMPT — JURISDICTION. — A New Jersey statute made it a crime to advise another to register illegally as a voter. The accused, a resident of New Jersey, wrote a letter to a resident of Pennsylvania, advising him to register illegally as a voter in New Jersey. This letter was never received. Upon an indictment in New Jersey for the statutory crime, the jury found the defendant guilty of an attempt. *Held*, that the conviction should be set aside. *State v. Stow*, 84 Atl. 1063 (N. J.).

The criminal act aimed at by the statute is the communication of the advice. *Cf. Lindsay v. State*, 38 Oh. St. 507; *Foute v. State*, 15 Lea (Tenn.) 712; *Mills v. State*, 18 Neb. 575, 26 N. W. 354. But considering the serious character of the crime attempted, that part of the act in the jurisdiction of New Jersey, *i. e.*, mailing the letter, would seem to be sufficiently near to completion to be punishable as an attempt. But it is necessary that the physical act contemplated by the defendant should be a crime; for the attempt is only a wrong to the state because of its connection in the actor's mind with some actual crime. See *Regina v. McPherson*, Dears. & B. 197, 201. It has been held that this crime may be one against an adjoining state, at least if the act contemplated is criminal in both jurisdictions, perhaps because the attempt may otherwise escape punishment. *King v. Krause*, 18 T. L. R. 238. See *State v. Terry*, 109 Mo. 601, 622, 19 S. W. 206, 212; 15 HARV. L. REV. 672; 16 HARV. L. REV. 491, 507. In the principal case, however, the act contemplated is that of advising a man in Pennsylvania to register illegally in New Jersey, which is not a crime by any law.

CRIMINAL LAW — SPECIFIC INTENT — ASSAULT WITH INTENT TO KILL. — The defendant shot at A. with the intention of killing him, but accidentally hit and wounded B. He was indicted for assault with intent to kill B. under a statute which made criminal an assault with intent to kill. *Held*, that the defendant may be convicted under the indictment. *State v. Gallagher*, 85 Atl. 207 (N. J.).

The unintentional killing of one person in the attempt to kill another is murder. The requisite mental element, malice aforethought, exists in the general felonious intent. *Gore's Case*, 9 Co. 81 a. But when by statute specific intent is made a part of a crime, that particular intent must be proved. *State v. Taylor*, 70 Vt. 1, 39 Atl. 447; *Simpson v. State*, 59 Ala. 1. Thus a person intending to shoot A. but accidentally shooting B. cannot properly be convicted of assault upon B. with intent to kill him. *People v. Keefer*, 18 Cal. 636; *State v. Mulhall*, 199 Mo. 202, 97 S. W. 583. *Contra, Callahan v. State*, 21 Oh. St. 306. But in such case he may properly be convicted of assault upon B. with intent to kill, for an intent to kill anyone is then obviously sufficient. *State v. Thomas*, 127 La. 576, 53 So. 868. See *Mathis v. State*, 39 Tex. Cr. App. 549, 47 S. W. 464. Cases where A. shoots at B. supposing him to be C. should also be distinguished, for there is a specific intent to kill the man shot at. *Regina v. Smith*, Dears. C. C. 559; *McGehee v. State*, 62 Miss. 772. A proper indictment would have been possible under the statute in the principal case which requires only an intent to kill. N. J. P. L. 1906, p. 430; *State v. Thomas*, *supra*. Where the indictment goes beyond the statute in requiring an intent to kill the person hit, the weight of authority holds that such must be proved. *State v. Shanley*,

20 S. D. 18, 104 N. W. 522. *Contra*, *Walker v. State*, 8 Ind. 290. But a different result in New Jersey may be based on the criminal procedure statute which allows reversal only when the defect in form substantially prejudices the defendant in maintaining his defense. N. J. CRIM. PROC. ACT, 1898, § 163.

DEEDS — CONSTRUCTION AND OPERATION IN GENERAL — WARRANTY DEED OF TIMBER. — For consideration the plaintiffs by warranty deed conveyed to the defendant, its heirs and assigns forever, all pine and cypress timber on certain land with the right to enter on the land for full turpentine and timber purposes. Thereafter for ten years the defendants removed no timber, whereupon the plaintiffs filed a bill in equity for cancelation of the deed as a cloud upon their title. *Held*, that a decree of cancelation will be granted. *McNair & Wade Land Co. v. Parker*, 59 So. 959 (Fla.).

It was early decided that a fee simple in timber may be conveyed by deed. *Barrington's Case*, 8 Co. 136 b; *Clap v. Draper*, 4 Mass. 266. But such an agreement is so unusual in nature and involves such serious consequences to the grantor, that no deed should be so construed, unless such is the manifest intention of the parties. See *McNair & Wade Land Co. v. Adams*, 54 Fla. 550, 555, 45 So. 492, 494; *Pease v. Gibson*, 6 Me. 81, 84. In the principal case there is no absolute grant of all timber forever growing upon the land. And the conveyance of the timber at present there is for specific uses, which require it to be cut and removed. Such a conveyance has been rightly decided not to pass an absolute fee. *Patterson v. Graham*, 164 Pa. St. 234, 30 Atl. 247; *McNair & Wade Land Co. v. Adams*, *supra*. Some courts hold that by a constructive severance the trees become the grantee's chattels, but his right of removal lapses within a reasonable time or such time as the deed specifies. *Zimmerman v. Daffin*, 149 Ala. 380, 42 So. 858; *Hoit v. Stratton Mills*, 54 N. H. 109. A better view, however, since not based on a fiction, holds that title passes subject, by an implied condition, to defeasance on failure of the grantee so to remove. *McRae v. Stilwell*, 111 Ga. 65, 36 S. E. 604. *Cf. Saltonstall v. Little*, 90 Pa. St. 422. On this view the principal case is correct.

DIVORCE — ALIMONY — MODIFICATION OF A DECREE WHICH ADOPTED AGREEMENT BETWEEN THE PARTIES. — In a suit for divorce *a vinculo*, a decree for permanent alimony incorporating an agreement between husband and wife was granted to the wife. On the wife's remarriage, the husband petitioned for a modification of the decree in accordance with the changed conditions of the parties. *Held*, that the decree should not be modified. *Emerson v. Emerson*, 45 Chic. Leg. N. 122 (Circ. Ct. of Baltimore City). See NOTES, p. 441.

EMINENT DOMAIN — COMPENSATION — EFFECT OF CHANGE OF USE. — The defendant's assignor by eminent domain proceedings acquired the right to flood the plaintiff's land for his grist mill. An electric-light plant was later substituted for the grist mill. The plaintiff seeks to enjoin the flooding of his land for the electric-light plant. *Held*, that the defendant may continue to flood the land on paying for the damage sustained by the operation of the electric-light plant over and above that which would be sustained by the operation of the grist mill. *Lucas v. Ashland Light Mill & Power Co.*, 138 N. W. 761 (Neb.). See NOTES, p. 439.

EMINENT DOMAIN — COMPENSATION — MORTGAGEE'S CLAIM ON FUND PAID INTO COURT. — Land held under a lease was taken by eminent domain proceedings, and the value of the lessee's interest was paid into court. The lessee had mortgaged his term and was also in arrears in rent. The lease contained a stipulation giving the lessor a right to enter for default in rent, but this right had not been exercised at the time the eminent domain proceed-

ings were instituted. Both the mortgagee and the lessor claimed the fund in court. *Held*, that the mortgagee prevails. *In re Dublin Corporation*, [1912] 1 I. R. 498.

That land taken for a public use should remain encumbered by mortgages, liens, and similar rights would obviously defeat the purpose of eminent domain proceedings. Therefore, when the owners of such rights are properly made parties, the land is taken free and clear. *Moore v. Mayor, etc. of New York*, 8 N. Y. 110. See 2 LEWIS, EMINENT DOMAIN, 3 ed., § 896. But that such rights should be wholly extinguished is neither necessary to the purpose of the proceedings nor expedient. Accordingly, a wife's inchoate right of dower is transferred to the fund paid as compensation. *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *Matter of Brooklyn Bridge*, 75 Hun (N. Y.) 558, 27 N. Y. Supp. 597. Tax liens survive against the fund. *Buchanan v. Kansas City*, 208 Mo. 674, 106 S. W. 531; *In re Sleeper*, 62 N. J. Eq. 67, 49 Atl. 549. And the same is true of those of judgment creditors. *Gimbel v. Stolte*, 59 Ind. 446. And it would seem that it should be true as to those of materialmen and vendors; in short, as to all real rights existing against the property. It is peculiarly inadvisable to weaken the security of mortgages. *South Park Commissioners v. Todd*, 112 Ill. 379; *Ex parte Lambton*, 3 Ch. D. 36. The same rules would apply to a landlord's lien; and even where the right to distrain confers only a right to acquire by seizure a lien superior to a prior mortgage, it is arguable that such a right should attach to the fund representing the tenant's goods. But the right to enter is not a lien on the term for back rent. It merely gives the lessor the right to end the term and prevent the accrual of future rent; and since the term is otherwise ended, it seems clear that he should have no lien on the fund. *Ex parte Carey*, 10 L. T. o. s. 37.

EQUITY — JURISDICTION — BILL TO ENJOIN ENFORCEMENT OF PENAL ORDINANCE. — The plaintiffs filed a bill to enjoin the enforcement of a penal ordinance of the defendant city, requiring insurance agents to pay a license before transacting business. *Held*, that the injunction will be denied. *City of Bisbee v. Arizona Ins. Agency*, 127 Pac. 722 (Ariz.).

Some courts hold that equity has no jurisdiction to enjoin criminal or penal proceedings. *Suess v. Noble*, 31 Fed. 855; *Old Dominion Telegraph Co. v. Powers*, 140 Ala. 220, 37 So. 195. Most courts, however, make exceptions in cases of multiplicity of suits or of irreparable injury to property. *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N. E. 1004; *Mayor, etc. of York v. Pilkington*, 2 Atk. 302; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18. But in applying these exceptions the authorities are in conflict. Courts are more ready to enjoin penal than criminal proceedings. See *Southern Express Co. v. Mayor, etc. of Ensley*, 116 Fed. 756, 759; *Sylvester Coal Co. v. City of St. Louis*, 130 Mo. 323, 330, 32 S. W. 649, 651. Yet substantially the question involved is the same, and no distinction should be made. See *Shinkle v. City of Covington*, 83 Ky. 420, 429; *In re Sawyer*, 124 U. S. 200, 211, 8 Sup. Ct. 482, 488. Moreover, equity has discretion to refuse injunction even in cases of multiplicity. So where the question is one of fact which should go to a jury equity may refuse to interfere. *Davis v. American Society for Prevention of Cruelty to Animals*, 75 N. Y. 362. But when as in the principal case the question is one of law, equity should exercise jurisdiction. *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907. The authorities are also in conflict as to what constitutes irreparable injury to property. Some courts refuse to enjoin where a mere right to do business is affected. *Yellowstone Kit v. Wood*, 43 S. W. 1068 (Tex.). Other courts, however, correctly recognize that the right to do business is substantially a property right. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121; *City of Hutchinson v. Beckham*, 118 Fed. 399. On either theory, therefore, an injunction should have been granted in the principal case.

EXECUTORS AND ADMINISTRATORS — ADMINISTRATION — EFFECT OF APPOINTMENT OF DEBTOR AS EXECUTOR ON INCOMPLETE RELEASE OF DEBT. — The testator appointed the defendant, who owed him a sum of money, as his executor. In his account book the testator had made an entry which he intended as a release of the debt. *Held*, that the appointment of the debtor as executor perfects the release. *In re Pink*, [1912] 2 Ch. 528. See NOTES, p. 445.

INFANTS — CONTRACTS AND CONVEYANCES — LIABILITY ON EXECUTORY CONTRACT FOR NECESSARIES. — The defendant, a nineteen-year-old billiard expert, agreed to accompany the plaintiff, a noted champion, on an exhibition tour. The defendant promised to pay all the expenses and probably expected instruction in the game. The defendant repudiated the contract. *Held*, that the plaintiff may recover. *Roberts v. Gray*, 57 Sol. J. 143 (Eng., Ct. App., Dec., 1912).

In this country instruction of various sorts has been considered necessary to an infant. *Glover & Co. v. Adm'r of Ott*, 1 McCord (S. C.) 572. See *Wallin v. Highland Park Co.*, 127 Ia. 131, 132, 102 N. W. 839. But in other cases various sorts of instruction have been found unwarranted by the infant's circumstances. *Middlebury College v. Chandler*, 16 Vt. 683; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722. English courts are more liberal than ours in respect to necessities. *Clyde Cycle Co. v. Hargreaves*, 78 L. T. R. 296; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775. Consequently the principal case may be justified in holding instruction in billiards necessary. But an infant's liability for necessities is properly quasi-contractual. *Locke v. Smith*, 41 N. H. 346; *International Text Book Co. v. Alberton*, 30 Oh. Circ. Ct. 352. See 7 HARV. L. REV. 72-73. Consequently, if no value has been given, as in an executory contract, there is no basis for recovery. *Mauldin v. Southern Shorthand, etc. University*, 3 Ga. App. 800, 60 S. E. 358; *Gregory v. Lee*, 64 Conn. 407, 30 Atl. 53. But see *International Text Book Co. v. Connelly*, 206 N. Y. 188, 194, 102 N. E. 722, 725. Some courts, indeed, would allow an action on the contract, limiting however the amount of recovery to the reasonable value of the part performed. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101. See *Cooper v. State*, 37 Ark. 421, 425. But such cases do not warrant recovery on a contract still unexecuted. *Peck v. Cain*, 27 Tex. Civ. App. 38, 63 S. W. 177. In England an infant is bound by an executory contract to serve another, if the contract would tend to benefit him. *Clements v. London & N. W. Ry. Co.*, [1894] 2 Q. B. 482. The principal case applies this doctrine to a contract for necessities. But it is not so essential for the protection of an infant that he be forced to keep his executory contracts for future necessities, as it is in the case of contracts of service. The American rule therefore seems preferable.

INJUNCTIONS — RESTRAINING PUBLIC OFFICERS AT SUIT OF TAXPAYER. — At the suit of a taxpayer, the Secretary of State was enjoined from submitting to popular vote a proposed constitutional amendment which lacked the required number of votes in the legislature. *Held*, that the injunction was proper. *Crawford v. Gilchrist*, 59 So. 963 (Fla.).

The jurisdiction of equity to protect a taxpayer against the misappropriation of public funds is generally conceded. *Crampton v. Zabriskie*, 101 U. S. 601; *City of Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359. The doctrine of the relief seems to be to prevent the breach of a public trust. See *Adams v. Brennan*, 177 Ill. 194, 198, 52 N. E. 314, 316; *City of New London v. Brainard*, 22 Conn. 552, 556. Public policy, on the other hand, and the theory of the distribution of governmental powers obviously require extreme caution in interfering with a public election or enjoining a state official. *Walton v. Develing*, 61 Ill. 201; *Mississippi v. Johnson*, 4 Wall. (U. S.) 475. On these

grounds some courts exclude equity jurisdiction entirely. *People ex rel. O'Reilly v. Mills*, 30 Colo. 262, 70 Pac. 322; *Scott v. James*, 7 Va. App. 158. See *State ex rel. Cranmer v. Thorson*, 9 S. D. 149, 68 N. W. 202. But when, as in the principal case, the official act is purely ministerial, these considerations of public policy should more properly affect not the jurisdiction of equity, but its exercise. *Mott v. Pennsylvania R. Co.*, 30 Pa. St. 9. If the threatened injury to the taxpayer is indisputable, it may more than balance the public policy. But if in the principal case the bulk of the expenses had already been incurred, the prospective injury to the individual taxpayer might seem too slight to warrant the injunction.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — EFFECT OF CARMACK AMENDMENT ON CONTRACTS LIMITING LIABILITY OF CARRIERS. — A contract for an interstate shipment limited the carrier's liability for loss of the goods from any cause to the value declared. By the state law such a contract was void, but it was valid by the law of the federal courts. The Carmack Amendment to the Interstate Commerce Act imposed liability upon the initial carrier for any loss caused by it or other carriers, and forbade contracting out of this liability, with the proviso that the shipper should not be deprived of any remedy he had under existing law. *Held*, that the contract is valid. *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148.

The amendment does not forbid limitation of liability from negligence to a fair valuation. *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218; *Carpenter v. United States Express Co.*, 139 N. W. 154 (Minn., 1912). *Contra, Kansas City Southern Ry. Co. v. Carl*, 91 Ark. 97, 121 S. W. 932. The proviso is interpreted as superfluous, or as referring only to federal law, since otherwise the uniformity of regulation desired would be defeated and variation in state rules would amount to discrimination among shippers in the different states. *Cf. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350. The question then is whether the amendment supersedes state laws as to limitation of liability and leaves the federal law. Before this amendment, the Interstate Commerce Act did not affect the states' jurisdiction on this subject. *Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132. The authorization of the Interstate Commerce Commission to control a particular subject in absence of its action does not prevent state regulation. *Missouri Pacific Ry. Co. v. Larrabee Flour Mills Co.*, 211 U. S. 612, 24 Sup. Ct. 214; *St. Louis, I. M. & S. Ry. v. Edwards*, 94 Ark. 394, 127 S. W. 713. Where the Commission has defined certain acts as discriminatory, the state may define others as discriminatory. *Puritan Coal Mining Co. v. Pennsylvania R. Co.*, 237 Pa. St. 420, 85 Atl. 426. Federal interstate regulation has not deprived states of power to regulate size of train crews, payment of wages, or to penalize delay. *Pittsburg, C. & St. L. Ry. v. State*, 172 Ind. 147, 87 N. E. 1034; *State v. Missouri Pacific R. Co.*, 147 S. W. 118 (Mo., 1912); *Traynham v. Charleston & West Carolina Ry.*, 71 S. E. 813 (S. C., 1911). A clear intention to suspend state power must be manifest. See *Reid v. Colorado*, 187 U. S. 137, 148, 23 Sup. Ct. 92, 96. But it is not necessary that the state statute be inconsistent with the federal statute to be invalid. *Southern Ry. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140. But *cf. Martin v. Oregon R. & Navigation Co.*, 58 Or. 198, 113 Pac. 16. And in the principal case the federal statute would seem to show an intent to occupy the entire field so as to exclude the state. *Contra, Elliott v. Atlantic Coast Line R. Co.*, 75 S. E. 886 (S. C., 1912); *J. M. Pace Mule Co. v. Seaboard Air Line R. Co.*, 76 S. E. 513 (N. C., 1912).

INTERSTATE COMMERCE — CONTROL BY STATES — CONSTITUTIONALITY OF STATE STATUTE COMPELLING RACE SEGREGATION ON ALL TRAINS. — A state

statute required all railroads carrying passengers in the state to provide equal but separate accommodation for the white and colored races. *Held*, that the statute is constitutional. *Alabama & Vicksburg Ry. Co. v. Morris*, 60 So. 11 (Miss.).

In absence of federal legislation, the state's power to regulate matters not requiring national uniformity, though affecting interstate commerce, is well settled. *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (U. S.) 299; *Plumley's Case*, 156 Mass. 236. Thus states may forbid the operation of all freight trains on Sunday. *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086. Or regulate the speed of trains passing through cities. *Erb v. Morasch*, 177 U. S. 584, 20 Sup. Ct. 819. Or prescribe licenses for all engineers operating trains in the state. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564. As in these cases, the principal case involved regulation of interstate commerce only as incidental to a general regulation. Local regulation seems peculiarly necessary here because of the divergent racial conditions in different sections of the country. *Smith v. State*, 100 Tenn. 494, 46 S. W. 566. But the argument that state regulation is invalid since uniformity is necessary to protect interstate passengers from frequent changing of coaches in case of variation in state legislation has often prevailed. *State ex rel. Abbot v. Hicks*, 44 La. Ann. 770, 11 So. 74; *Hart v. State*, 100 Md. 595, 60 Atl. 457; *Carrey v. Spencer*, 72 N. Y. St. 108, 36 N. Y. Supp. 886. But this was not thought sufficient to invalidate a state's regulation as to heating apparatus on all coaches, although inconsistent regulation might compel the use of different cars in different states. *New York, N. H. & H. R. v. New York*, 165 U. S. 628, 17 Sup. Ct. 418. Moreover, legislation incompatible with that in the principal case is impossible, since statutes forbidding racial separation in all coaches are unconstitutional. *Hall v. De Cuir*, 95 U. S. 485. The principal case seems clearly within the police power, since separation of races in common carriers is recognized as its proper exercise. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138; *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101. This is consistent with the unconstitutionality of statutes forbidding racial separation, since enforced racial intermingling cannot be a valid exercise of the police power. *Smith v. State*, *supra*.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — TERMINI WITHIN ONE STATE OF ROUTE PARTLY WITHIN ANOTHER STATE. — The defendant, agent of an express company, was convicted for failure to pay a tax imposed by the plaintiff on the business of express companies in receiving and transmitting packages from and to places within the state "excepting such packages which are interstate commerce." The route used by the defendant for carrying express packages to or from this city, though the other terminus was within the state, ran for a considerable distance through another state. *Held*, that the conviction is not error. *Ewing v. City of Leavenworth*, 226 U. S. 464, 33 Sup. Ct.

Under the wording of the statute the court necessarily holds that this was not interstate commerce. The opposite result was reached when the question was whether the state could regulate the rates for such transportation. *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214. Under a similar set of facts a tax on the receipts proportionate to the mileage was upheld, and the court rests its decision on this case. *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806. See 16 HARV. L. REV. 597. The result is desirable since the tax is clearly not contrary to the purpose of the Commerce Clause. But it is submitted that there can be no ground for holding that the transportation is interstate commerce for one purpose and not for another.

JUDGMENTS — SATISFACTION — EFFECT OF ASSIGNMENT TO MAKER OF NOTE OF JUDGMENT AGAINST INDORSER. — The holder of a promissory note sued the maker and the indorser. The maker filed an answer, but the indorser allowed judgment to be entered against him by default. The holder assigned the judgment against the indorser to the maker. The judgment debtor moved to have the judgment discharged of record on the ground that the assignment to the maker amounted to a satisfaction of the judgment. *Held*, that the motion should be granted. *Chicago Varnish Co. v. Hargood Realty & Construction Co.*, 138 N. Y. Supp. 93 (Sup. Ct., App. Term).

When one not a party to a judgment pays the judgment creditor there will be no satisfaction of the judgment unless so intended. *Marshall v. Moore*, 36 Ill. 321; *Bender v. Matney*, 122 Mo. 244, 26 S. W. 950. By taking an assignment of the judgment the intention not to extinguish it is shown. *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Noble v. Merrill*, 48 Me. 140. But the court argues that, since the indorser is discharged when the maker takes up a note, the same effect should follow the purchase by the maker of the judgment founded on the note. It is true that a cause of action is not so far merged in a judgment as to prejudice equitable rights connected with the original cause of action. For example, a judgment entered after the filing of a petition in bankruptcy and before discharge will be considered discharged in bankruptcy if the debt from which the judgment arose will be so discharged. *Clark v. Rowling*, 3 N. Y. 216. But a judgment against an indorser is distinct from the note, and no longer includes any obligation of the maker. The maker's liability is not fixed thereby, as he may have a good defense against the indorser. *Fenn v. Dugdale*, 31 Mo. 580. Therefore the principal case seems incorrect. *Cf. Bardon v. Savage*, 1 Mo. 560. If the maker had a good defense he would lose by the court's decision what he had paid for the assignment.

LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — RIGHTS OF SUBLESSEE AFTER SURRENDER BY LESSEE. — The plaintiff's lessee surrendered his term after making a sublease to the defendants. The defendants refused to vacate, and retained possession until the expiration of their term. The plaintiff sued for use and occupation of the premises since the surrender. *Held*, that he cannot recover. *Seemle*, that no recovery can be had under the sublease. *Bulthner v. Kasser*, 127 Pac. 811 (Cal., Dist. Ct. App.).

The principal case adopts the orthodox view. *Thre'r v. Barton*, Moore C. C. 94. *Cf. Webb v. Russell*, 3 T. R. 393. The sublessee's rights, it is said, cannot be prejudiced by the surrender. *Eten v. Luyster*, 60 N. Y. 252. Neither lessor nor sublessor can sue, because the reversion to which the rent is incident is extinguished by a merger. See *Krider v. Ramsay*, 79 N. C. 354, 358; *Bailey v. Richardson*, 66 Cal. 416, 422, 5 Pac. 910, 914. The result is obviously unjust. It cannot be remedied by implying a transfer of the rent to the surrenderee, for rent is properly transferable only under seal. See TIFFANY, LANDLORD AND TENANT, 1108. Nor can an assignment of the rights under the covenants of present-day leases be presumed, for such rights *primâ facie* end with the termination of the tenancy. See TIFFANY, LANDLORD AND TENANT, 361. It might be said that although the surrender frees the underlessee's legal estate from liability for rent, he holds in subordination to the original lessor's title, and so to prevent unjust enrichment will be liable for use and occupation. Another theory is that the merger of the lessee's estate in the reversion destroys all rights dependent on that estate, including the underlessee's term; and logically this view seems sound, though it is unjust to the underlessee. A third solution presumes an attornment from the underlessee to the surrenderee. See *Hessel v. Johnson*, 129 Pa. St. 173, 179, 18 Atl. 754, 755. In some jurisdictions statutes have abrogated the old doctrine. N. Y. REAL PROPERTY LAW (CONSOL. LAWS, 1909, c. 52), § 226; STAT. 4 GEO. II, c. 28,

§ 6; STAT. 8 & 9 VICT., c. 106, § 9. Legislatures are, unfortunately, slow to perceive the necessity of such statutes. See 18 GREEN BAG 426; 19 GREEN BAG 317.

LANDLORD AND TENANT — ASSIGNMENT AND SUBLETTING — SUBLEASE FOR FULL TERM WITH RIGHT OF REENTRY RESERVED. — The plaintiff leased property to a company which sublet to the defendant for the rest of its term, reserving a certain rent and a right to enter if the rent were not paid. The plaintiff sued the defendant as assignee of the lease for the original rent. *Held*, that the plaintiff cannot recover. *Davis v. Vidal*, 151 S. W. 290 (Tex., Sup. Ct.).

A sublease conveying the whole remainder of the sublessor's term and leaving no interest in the land in himself is regarded, at least as between the original lessor and the sublessee, as an assignment of the term. *Hollywood v. First Parish in Brockton*, 192 Mass. 269, 78 N. E. 124. See *Bedford v. Terhune*, 30 N. Y. 453, 458. Of course where there is a reversion in the lessee the whole interest does not pass. But a right of entry is generally held not to have that effect. *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742. That a right of entry is an interest in the land in the nature of a reversion has been given as a reason in some cases for holding it to be devisable. *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215. See *Proprietors of Church in Brattle Square v. Grant*, 3 Gray (Mass.) 142, 148. But by the weight of authority it is a mere personal right, in the nature of a chose in action, to get back an interest which one has conveyed away. *Nicoll v. New York & Erie R. Co.*, 12 N. Y. 121; *St. Joseph & St. Louis R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 135 Mo. 173, 36 S. W. 602. Since for the time being no interest or estate in the land is retained, it seems that the transaction is in substance an assignment. The Statute of *Quia Emptores* creates a similar situation in regard to estates in fee, and it is applied to cases where a right of entry is reserved. See *Doe d. Freeman v. Bateman*, 2 B. & Ald. 168, 170; LEAKE, PROPERTY IN LAND, 2 ed., 170-171, 174. Such a sublease as that in the principal case has been held to be an assignment on the ground that a right of entry cannot exist apart from a reversion, and is therefore void. *Cameron Tobin Baking Co. v. Tobin*, 104 Minn. 333, 116 N. W. 838. But this reasoning seems untenable and unnecessary. *Doe d. Freeman v. Bateman*, *supra*.

MASTER AND SERVANT — DUTY OF MASTER TO PROVIDE SAFE APPLIANCES — SUBSTITUTION FOR LIABILITY. — The plaintiff sued in New York for a negligent injury by his employer occurring on a German vessel in New York harbor. The defendant pleaded a contract of employment made in Germany under a compulsory Workmen's Compensation Act, which provided that the employee should give up his right of action for negligence and instead have recourse to an insurance fund made up by the contributions of employer and employee. *Held*, that this defense is not against the public policy of New York. *Schweitzer v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 138 N. Y. Supp. 944.

The law of the port rather than the law of the flag must govern all rights arising from the tort in this case. *Geoghegan v. Atlas Steamship Co.*, 3 N. Y. Misc. 224, 22 N. Y. Supp. 749; *Sherlock v. Alling*, 93 U. S. 99. But a foreign contract valid by the *lex loci contractus* may be a defense, unless the recognition of it is open to some special objection by the law of the forum. See 25 HARV L. REV. 385. The enforcement of the contract in New York would not seem to be a denial of due process of law, although the German statute under which the contract was made would perhaps be unconstitutional if passed by the New York legislature. See COOLEY, CONSTITUTIONAL LIMITA-

TIONS, 7 ed., 517-518; BRANNON, FOURTEENTH AMENDMENT, 110 *et seq.* Nor should it be held against public policy to enforce a contract which substitutes for the ordinary tort liability an obligation to contribute to an insurance fund. The most serious objection to an agreement of this sort is the danger that the employer may relax his efforts to provide safeguards, because his negligence will not now have so direct and immediate an effect on his purse. Contracts for exemptions from all liability for negligence to the employee have long been regarded as against public policy by the great weight of authority, although the employer generally specifies that the employee is compensated by an increased wage. *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388; *Roesner v. Hermann*, 8 Fed. 782. *Contra*, *Griffiths v. The Earl of Dudley*, 9 Q. B. 357. So in the law of common carriers a contract against all liability for negligence is almost universally refused recognition. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Illinois Central R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019. *Contra*, *Cragin v. New York Central R. Co.*, 51 N. Y. 61. But a contract with a carrier limiting liability to what is still a substantial amount is very generally allowed. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Graves v. Lake Shore & Michigan Southern R. Co.*, 137 Mass. 33. *Contra*, *Overland Mail & Express Co. v. Carroll*, 7 Colo. 43, 1 Pac. 682. To be sure, in the law of carriers it is a question of safeguarding the right of the public to efficient public service, whereas in the law of master and servant the state is protecting itself from the burden of injured workmen. But it is submitted that the essential point of protecting the public interest is equally attained in either class of cases by a substantial liability. In the long run the annual assessments for the insurance fund required by the contract in the principal case must be influenced by the number of accidents, and this will prove a substantial incentive to due care.

NUISANCE — WHAT CONSTITUTES A NUISANCE — EXTINGUISHMENT OF CAUSE OF ACTION BY PAROL LICENSE. — A landowner sued the defendant for maintaining a nuisance by establishing a pumping station on adjoining land. In consideration of the payment of a judgment entered by consent the landowner released all claims which she, "her executors, administrators, heirs, grantees, or assigns" should acquire on account of the alleged nuisance. The landowner conveyed to the plaintiff, who brought suit for damages caused by the pumping station. *Held*, that the plaintiff cannot recover. *Panama Realty Co. v. City of New York*, 48 N. Y. L. J. 1690.

The decision rests on the theory that the right to enjoy one's own land undisturbed by the various uses of neighboring land which the law has classed as private nuisances, is a natural right in the nature of an easement or servitude imposed by law upon the neighboring land. If a landowner gives a parol license to do acts on the licensee's land inconsistent with a servitude of the licensor's, the license becomes irrevocable when the licensee has acted in reliance thereon, and extinguishes the servitude. *Morse v. Copeland*, 2 Gray (Mass.) 302; *Winter v. Brockwell*, 8 East 308. In the principal case the consensual judgment followed by the continuance of the pumping station was assumed to have this effect. But, it is submitted, the right to maintain a nuisance which restricts the ordinary enjoyment of the injured land and permits an extraordinary use of the injuring property, resembles the creation rather than the extinguishment of a servitude. *Cf. Churchill v. Russel*, 148 Cal. 1, 82 Pac. 440; *City of Kewanee v. Olley*, 204 Ill. 402, 413, 68 N. E. 388, 392. See *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 142, 153, 154. A legal servitude must be created by grant or prescription. *Fentiman v. Smith*, 4 East 107; *Morse v. Copeland*, *supra*. The agreement in the principal case might create some equitable servitude. *Cf. Rerick v. Kern*, 14 Serg. & R. (Pa.) 267; *McBroom v.*

Thompson, 25 Or. 559, 37 Pac. 57. But it should not be valid against an innocent purchaser. *Taggart v. Warner*, 83 Wis. 1, 53 N. W. 33; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. 376.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — CORNERING THE MARKET. — The defendants were indicted for conspiring to corner the cotton market by the making of contracts for the purchase for future delivery of cotton greatly in excess of the available supply for the year, coupled with a temporary withholding from sale, with the purpose of securing control of the supply and enhancing the price. *Held*, that the indictment charges an offense under the Sherman Anti-Trust Law. *United States v. Patten*, 226 U. S. 525, 33 Sup. Ct. 141.

The acquisition of a dominant portion of the cotton supply available for the year, by a combination resulting in an elimination to a large degree of any possible competition in meeting the demand for that supply, presents a situation dangerous to the public interest, particularly when such demand is artificially stimulated; and accordingly it constitutes an undue restraint within the rule laid down by the Supreme Court. See 26 HARV. L. REV. 379.

SPECIFIC PERFORMANCE — DEFENSES — RIGHT OF JOINT VENDEE TO CONVEYANCE TO HIMSELF ALONE. — The defendant promised under seal to convey land to the plaintiff and the co-defendant if the purchase price was paid before a certain time. The co-defendant refused to go on, and procured from the defendant another option to purchase the same property. The plaintiff tendered the purchase price within the specified time and brought suit for specific performance, asking a conveyance to himself alone. *Held*, that the decree should be granted. *Shaeffer v. Herman*, 85 Atl. 94 (Pa.).

The court considered that the tender of the purchase price completed the contract. Ordinarily joint obligees on a contract must join in a suit for specific performance. *Davis v. Pfeiffer*, 213 Ill. 249, 72 N. E. 718. But where one wrongfully refuses to join as plaintiff he may be joined as defendant. *Cook v. Haaly*, 1 Cooke (Tenn.) 465. Ordinarily, however, the conveyance decreed should be the one promised. *Davis v. Pfeiffer*, *supra*; *Sproule v. Winant's Heirs*, 23 Ky. 195. When two jointly contract to buy land, each thereby becomes equitable owner of a one-half interest, and by paying more than a proportionate share of the purchase price one of the joint purchasers does not thereby become the owner in proportion to the overpayment. See *Freeman v. McMillian*, 2 Lea (Tenn.) 121, 123. And it has been held that one who pays the entire price has no equitable claim on the other's share. *Crane v. Caldwell*, 14 Ill. 468. See *Glasscock v. Glasscock*, 17 Tex. 480, 486. Another view, however, recognizes an equitable lien. *Tompkins v. Mitchell*, 2 Rand (Va.) 428. It has been suggested that even where, as in the principal case, the conveyance has not yet been made, the entire equitable interest should rest in one who has paid the money, subject to a right of redemption by the joint obligee. *Deitzler v. Mishler*, 37 Pa. 82. On this view, since the co-defendant disclaimed all rights under the contract and refused to pay his share of the purchase price, it would seem proper for the court to convey the entire property to the plaintiff, thereby strictly foreclosing the co-defendant of his interest.

SURETYSHIP — SURETY'S DEFENSES: VARIATION OF RISK — SURETY'S LIABILITY ON APPEAL BOND WHERE JUDGMENT AFFIRMED BY CONSENT. — Upon appeal from a judgment, a bond was given conditioned upon the appellant's payment of all judgments which might be rendered against him. The judgment appealed from was affirmed by consent of the parties. *Held*, that the surety is not released from the bond. *First State Bank of Mountain Lake v. C. E. Stevens Land Co.*, 137 N. W. 1101 (Minn.).

Any agreement canceling the principal obligation cancels the surety's obligation. *Whitcher v. Hall*, 5 B. & C. 269. Though the principal obligation is preserved, an agreement between creditor and principal increasing the surety's potential risk releases him. *Holme v. Brunskill*, 3 Q. B. D. 495. Appeal bonds are conditional upon reversal or payment. It has been held that an affirmance by consent increases the risk by destroying the surety's chance for reversal and therefore releases him. *Johnson v. Flint*, 34 Ala. 673. But some courts argue that the surety is nevertheless bound because the principal in agreeing to affirmance acts within his authority. *Bailey v. Rosenthal*, 56 Mo. 385; *Howell v. Alma Milling Co.*, 36 Neb. 80; *Drake v. Smythe*, 44 Ia. 410; *Thomas Motor Branch Co. v. United States Fidelity & Guaranty Co.*, 153 N. Y. App. Div. 32. Moreover, the principal could have defaulted on appeal without releasing the surety. Cf. *Share v. Hunt*, 9 Serg. & R. (Pa.) 404. And an affirmance by consent has been considered equivalent in substance to default. *Ammons v. Whitehead*, 31 Miss. 99. These arguments forget that it is the creditor's conduct and not the principal's, in agreeing to the affirmance, that is to be considered, since the equitable defense of variation of risk rests upon the creditor's duty to the surety. But contrary decisions releasing the surety overlook the difference between the two conditions of the bond. The creditor owes the surety an equitable duty not to interfere with payment. *Leonard v. Village of Gibson*, 6 Ill. App. 503; *Ross v. Ferris*, 18 Hun (N. Y.) 210. But he owes no such duty as to reversal. His avowed purpose is, indeed, to prevent reversal, and securing an affirmance by any lawful means should not release the surety. *Chase v. Beraud*, 29 Cal. 138. Some courts, however, hold that an affirmance by consent is never within the contemplation of the bond. *Large v. Steer*, 121 Pa. St. 30, 15 Atl. 490. Cf. *Baker v. Frellsen*, 32 La. Ann. 822; *Foo Long v. American Surety Co.*, 146 N. Y. 251, 40 N. E. 730.

TRADE MARKS AND TRADE NAMES — EQUITABLE PROTECTION OF A TRADE NAME WHERE NO ACTUAL COMPETITION. — The plaintiffs had developed a nation-wide business in milk products, such as condensed milk, malted milk, and cream, under the trade name "Borden." A manufacturer of ice cream organized the defendant company with a nominal incorporator by the name of Borden, presumably for the sole purpose of enabling the ice cream to be sold under the name "Borden." The plaintiffs, who had hitherto sold an ice cream only for use in hospitals, brought a bill in equity to enjoin the deceptive use of the trade name, alleging that they were about to put a commercial ice cream on the market. Held, that no injunction should be granted. *Borden's Condensed Milk Co. v. Borden's Ice Cream Co.*, 45 Chic. Leg. N. 121 (C. C. A., Seventh Circ.). See NOTES, p. 442.

BOOK REVIEWS.

THE DISTINCTIONS AND ANOMALIES ARISING OUT OF THE EQUITABLE DOCTRINE OF THE LEGAL ESTATE. By R. M. P. Willoughby. Cambridge, England: The University Press. 1912. pp. xx, 118.

Too much should not be expected of a doctor's dissertation, which as such may be highly creditable to its author and yet not all that might be desired as a discussion of the subject chosen. Thus, the present example is excellently written, contains many acute and valuable observations, such for instance as the suggestion that in modern judicial applications of the doctrine of tacking we may "detect a note rather of triumph than of surrender — the triumph of art, not the surrender of justice to the binding force of unfortunate precedent"

(p. 71), is closely reasoned from the author's premises, and shows a good sense of proportion in the treatment of the topics considered. These things lead us to expect much from the author in the future. But one can only regret that of the possible conceptions of equity he should have adopted and taken for his starting point the over-refined, scholastic conception that developed by way of reaction from the attempt of seventeenth-century chancellors to identify law and morals, rather than the conception which Langdell and Ames and Maitland following them have worked out so completely and justified so thoroughly both by history and by analysis.

Mr. Willoughby assumes that equitable rights may be rights *in rem*, and hence that equitable interests or estates are real interests. From this standpoint doctrines as to *bona fide* purchase for value are criticized as anomalous, since they allow these real interests to be cut off where a corresponding legal interest would not be affected. If one takes what must be regarded as the orthodox view of such interests, the anomaly disappears. But it does not seem that there is an anomaly even from the standpoint that equitable interests are real. As Maitland has pointed out, it is quite possible to say that *cestui que trust* has a right against the whole world that no one except a purchaser for value without notice shall take the trust *res* for any purpose except to carry out the trust. Indeed one need not put it in so involved a form. It is entirely allowable to say that equity regards *cestui que trust* as having a right against the whole world that no one shall take the *res* for any other purpose than to carry out the trust and yet recognize that, in order to protect the social interest in security of transactions and security of acquisitions, equity concedes to the holder of the legal title, who stands before the world as owner, a power to confer a complete title upon a purchaser for value without notice. It is usual to say that this power to convey to a purchaser for value without notice who will take free of the equity is decisive against the view that there may be equitable rights *in rem*.¹ A few examples may suffice to show that this is fallacious. To take one from the common law, a sale in market overt will give a title good against the (former) legal owner. That is, the seller in market overt, for protection of the social interests in security of transactions in the public markets and security of acquisitions, was conceded a power of conferring an original title by the sale. Yet no one would say that at common law the rights of owners of cattle were not rights *in rem*. Again, where land is conveyed and the conveyance is not registered, in most of our jurisdictions, although title has passed, there is a power in the owner of record, who now has no title, to confer an original title good against all unregistered interests, upon a purchaser for value without notice who records. Yet no one would say the rights of the holder of the unrecorded conveyance were *in personam* only. Nor is it necessary to accept the suggestion frequently urged by Sir Frederick Pollock, namely, that Trust is *sui generis*. One may say there are two things involved, a fiduciary relation and an equitable ownership. The relation involves a personal duty of the trustee to perform the trust *in specie* and a right *in personam* of *cestui que trust* to have it so performed. The ownership is a right *in rem* that no one shall take the *res* for any purpose other than to perform the trust, but is subject to a power in the trustee to give a title free of such right to a purchaser for value without notice. There is nothing anomalous in this. A contract in the same way creates a personal relation, a right *in rem* and a power. The obligee has a right *in personam* against the obligor. He has also a right *in rem* that no one shall interfere with the profitable relation thereby created. The obligor has a power, in ordinary contracts, by breach of his promise to put an end to his duty of performing *in specie* and substitute a duty of paying damages.

There is much more to be said, therefore, upon the question of the nature

¹ See Hart, The Place of Trust in Jurisprudence, 28 Law Quarterly Review, 290.

of equitable rights than the English books have said thus far. Mr. Willoughby passes over this question lightly and the value of his critique is impaired in consequence. But one point which he makes is suggestive and valuable. He shows that originally seisin involved a power to defeat legal title precisely as legal title now involves a power to defeat equitable interests, and very aptly compares conveyance by a trustee to a purchaser for value with a tortious feoffment. When the person seised stood before the world as owner, the reason for recognizing this power in him was obvious. The analogy suggests that a further development may yet take place, as all causes come to be administered by one tribunal in one proceeding, which will treat all interests in property as legal interests. But in that event it is not unlikely that some development of the power of cutting off such interests, on the common-law analogy of sale in market overt, may become necessary.

The remainder of the book is chiefly taken up with the English doctrine of tacking incumbrances or the *tabula in naufragio*, which is handled in the best analytical fashion and carried out to its logical results in a way that is interesting and suggestive. The English derive many advantages from unity of jurisdiction, and in many ways there are heavy disadvantages in the American diversity of independent jurisdictions making, as Professor Wigmore so felicitously puts it, the question, "What is the law?" one "which cannot be answered except as with fifty tongues speaking at once." But there is one great advantage with us which goes far to make up for the disadvantages. We are not constrained to find ingenious reasons for bad rules which are beyond the reach of juristic criticism. No course of decision in one court can put bounds to our juristic search for the right. Every doctrine, therefore, must undergo tests of history, analysis and fitness to its ends and to the ends of law, so long as it is open or likely to be reopened in any of our fifty jurisdictions. Hence an American author in like case would have had opportunities to do much more than was possible in England.

R. P.

VALUATION OF PUBLIC SERVICE CORPORATIONS. Legal and Economic Phases of Valuation for Rate Making and Public Purchase. By Robert H. Whitten. New York: Banks Law Publishing Company. 1912. pp. xl, 798.

Now that it has become understood that in dealing with the public services we have to do with a distinct class of economic agencies subject to common law, we may expect much progress to be made by careful studies of particular phases of the general problem which the public utilities present. It is probable that no one problem is of more importance than the one which this book treats so exhaustively. Certainly there is nothing in public-service regulation that seems more basic to-day. With us in America, wherever regulation is going on there is always on guard that provision of the Constitution which is said to forbid confiscation. Property devoted to public service, indeed, is to-day better protected than any other property subject to our police. For the decisions to-day will put a stop to regulation of public utilities which prevents the earning of a proper return upon fair value. Fair value is therefore the crux of the whole matter, and from the transitory point of view of the courts fair value means present value. But what does present value mean — does it mean the cost to reproduce new the actual plant in its present state? This is what one is often told has been so thoroughly established, that all that is left for us to do is to see that the details are properly worked out. The worth of such a book as this shows in nothing more than its refusal to take all this for granted. It goes back to the authorities, and lets each court speak for itself. And with insight into the problem it warns against laying down rigid rules.

Public-service law is law still in the making, as the quotations in this book show. We need to have all the material of every sort brought together for study as is here done. Then we should be brought face to face with the policies involved and their respective consequences. We need to have such workmanlike summaries of all the material, and we should be made aware of all its possibilities by such enlightening presentation. One must be as well aware of the trend of economic thought as the author, in order to be a wise counsellor these days in matters of legal policy.

B. W.

HANDBOOK OF THE LAW OF BANKS AND BANKING. By Francis B. Tiffany. St. Paul: West Publishing Company. 1912. pp. xi, 669.

The first half of this book is devoted to the usual dealings between bank and customer. The chapters here correspond very closely in legend with the windows used for such dealings, — "deposits," "loans and discounts," etc. The rest of the book treats of "clearing houses"; "the bank as a corporation with corporate powers and corporate officers"; "insolvency"; "national banks"; "savings banks." The acts of Congress relating to national banks are printed in an appendix.

So the author covers, in expert "hornbook" fashion, the points at which the business of banking comes most conspicuously into contact with the law; that is, with the general rules of law, — as to negotiable instruments, trusts, corporations, even crime. This is not really stating a law of banks and banking, but it serves to show the proper windows.

The proportions of the work are good and the collection of material appears to have been thorough. Perhaps a little more time might have been spent over the material after it was collected. What amounts to notice that a check has been drawn to misappropriate fiduciary funds? One who has puzzled over the conflicting decisions of the courts will find little help in the book at hand. The text rarely ventures beyond the limits of decided cases, except to quote some other writer; frequently, as it happens, in this magazine.

A. R. C.

ROMAN LAWS AND CHARTERS. THREE SPANISH CHARTERS AND OTHER DOCUMENTS. Translated with Introduction and Notes by E. G. Hardy. Oxford: The Clarendon Press. London: Henry Frowde. 1912. pp. v, 176; iv, 158.

LETTERS TO A YOUNG LAWYER. By Arthur M. Harris. St. Paul: West Publishing Company. 1912. pp. 193.

LEADING CONVEYANCING AND EQUITY CASES. By John Indermaur. Tenth Edition by Charles Thwaites. London: Stevens and Haynes. 1913. pp. xvi, 190.

STATUTE LAW MAKING IN THE UNITED STATES. By Chester Lloyd Jones. Boston: Boston Book Company. 1912. pp. xii, 327.

TAXATION IN MASSACHUSETTS. By Philip Nichols. Boston: Financial Publishing Company. 1913.

INTERNATIONAL LAW SITUATIONS. With Solutions and Notes. Naval War College. Washington: Government Printing Office. 1912. pp. 206.

INDUSTRIAL COMBINATIONS AND TRUSTS. By William S. Stevens. New York: The MacMillan Company. 1913. pp. xiv, 593.

THE LAW OF QUASI CONTRACTS. By Frederick Campbell Woodward. Boston: Little, Brown, and Company, 1913. pp. lxi, 498.

LIST OF SUBJECTS OF AMES COMPETITION BRIEFS CONTAINED IN THE
HARVARD LAW SCHOOL LIBRARY.¹

- ADVERSE POSSESSION — Equitable Servitudes — Notice thereof to Disseisor.
- CARRIERS — Liability of Railroads for Delay — Non-negligent Failure to have Servants.
- CONTRACTS — Contracts for Benefit of Third Party — Release by Beneficiary — Action by Promisee.
- CONVERSION — Railroad carrying and delivering Stolen Goods.
- EQUITY — Latent Equities — Equitable Claims on Equity of Redemption.
- EQUITABLE CONVERSION — Option exercised after Death of Optioner — Rights of Heir and Next of Kin.
- EVIDENCE — Admissibility of Evidence illegally obtained — Unreasonable Searches and Seizures.
- EVIDENCE — Comment on Claim of Privilege.
- HUSBAND AND WIFE — Rights of Wife against Husband — Recovery of Expenditures for Necessaries.
- LANDLORD AND TENANT — Surrender by Operation of Law — Reletting by Landlord.
- PRESCRIPTION — Against whom Right acquired — Public Service Company — Railroad.
- PUBLIC SERVICE COMPANIES — Rights and Duties — Duty to give Equal Service involving Breach of Existing Contract.
- QUASI-CONTRACTS — Rights under Contract — Breach by Plaintiff — Right to recover on *Quantum Meruit*.
- RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — Restrictions in Favor of a Business.
- SALES — Fraud on Seller — Misrepresentation of Buyer as to Identity.
- SALES — Warranties — Nature of Action for Breach — Tort or Contract — Infant's Warranty.
- TELEGRAPHS — Liability for Failure to deliver Message — Liability to Addressee for Mental Anguish.
- TORTS — What constitutes Cause of Action — Act or Damage — One Act injuring Person and Property.
- TORTS — Legal Cause — Negligent Delay by Carrier — Goods destroyed by Act of God.
- TRADE SECRETS — Protection in Equity — Rights in Design — *Bonâ fide* Purchaser.

¹ See p. 437, *supra*.

HARVARD LAW REVIEW.

VOL. XXVI.

APRIL, 1913.

NO. 6.

INTERLOCKING DIRECTORATES, THE PROBLEM AND ITS SOLUTION.

IT is only in very recent years that the relationship between the director and the corporation has been receiving serious public attention. The present interest in the subject results from the unusual conditions obtaining since the year 1896. A great change has occurred in business methods and conditions during this period. About fifteen years ago was ushered in an era of expansion in trade and business of every kind. The resources of the nation were unprecedentedly developed and business established upon the largest scale ever known in this country, or perhaps in any other. Apparently it was deemed necessary by those engaged in the promotion of various manufacturing, industrial, and financial enterprises to bring about consolidations and combinations of organizations engaged in the same line of activity but more or less competitive. This brought together in the enlarged organization representatives or former owners of the constituent companies theretofore independent, but by consolidation made into a single unit of influence and operation. It goes without saying that these undertakings could not have succeeded without the supply of ample, and indeed large, financial resources. This requirement brought into the situation banking firms and corporations having a very large public following and influence.

There are two distinct views, each honest and each entitled

to credit for sincerity, with reference to the wisdom of the changed policy as applied to the various commercial, railroad, and financial interests. The one insisting that combination of independent enterprises, heretofore competitive, into large and massive organizations, if continued and persisted in, will work serious and irreparable injury to the nation; that the most important thing for the life and endurance of a nation is the character, the independence and competency of its people; that business is always at hand but men are not; that resources are ever present, but men are required to develop them; that wealth is constantly at our door, but men are needed to gather and utilize it; that these massive combinations impoverish the nation in its constructive business men; that they destroy independence, shatter hopes, and make for a nation of clerks and subordinates, instead of men and masters.

On the other hand, it is claimed, with equal sincerity, that this nation in taking rank amongst the nations of the world must keep pace with the tremendous commercial development of the times, and to do so, must have large means, large facilities, and large and comprehensive organizations, and that this cannot be attained under the competitive conditions which previously existed, but only by establishing larger business and individual units. It is said that though competition in this country may thus be interfered with, greater opportunity for the industries of the nation as a whole, in competing with the industries of other nations, is thereby established and assured.

Be that, however, as it may, combinations and consolidations were made, and therewith came many and serious abuses, some of which were vicious in intent and most of which grew and developed from the very nature of things. It is only within the last few years that the public mind has become alive to the existing conditions. Discontent and unrest have been widespread throughout the land. With these have come an awakened public protest and the nation is brought face to face with some of the most serious problems of the day, namely, the relationship of directors; the abuses of their powers; the violation of their duties, and the liability for their conduct and acts, either of omission or commission. These involve not only the duties, obligations, and liabilities of directors individually, but also of other corporations, having common or dual interests, of which they are also directors.

This awakening of the people has been sudden and the assault has been swift. Those who are the subject of attack had been lulled into security by inaction resulting from ignorance and intimidation. Resting upon that faint security, they have felt themselves buttressed and fortified in law. It is our purpose to demonstrate that the law, instead of furnishing protection and justification for the practices engaged in, will, when promptly availed and diligently enforced, make for the undoing and prevention of what have been misguided, mistaken, or improper practices.

Present Fiscal Practice.

In recent years the practice has prevailed by which financial institutions have become the fiscal agents or issuing houses for corporation securities made to meet the financial requirements, and in the process it usually happens that some representative of such financial institution is a member of the board of directors of the corporation for which it is acting as the fiscal or issuing agency. Knowing how important to the success of any enterprise is the element of financial aid, we can well appreciate, with the fiscal agent at the table of directors, that in the discussion of the financial policy and the financial requirements of the issuing corporation, the influence of such agency is not only persuasive, but dominating. It is, of course, absolute when the fiscal agency is exclusive.

Such a condition is insupportable. It is violative of freedom and independence of business and trade, and is contrary to both law and equity. The corporation does not deal at arm's length with the banking or financial institution thus dominating its directory. There are not two sides to the transaction, and it is clearly one in which the director represents both buyer and seller — a condition so subversive of correct business practice that injury must result to either one or the other, regardless of intention.

We find in this practice banking institutions, through membership on the board of directors, controlling the fiscal policy, and indeed, we may say, the business policy of railroads, manufacturing companies, and commercial enterprises. The result is that these financial institutions very largely control that branch of business

which deals with the issue and negotiation of securities, and not only dominate the issuance and character of the securities, but are able to become the purchasers thereof.

Coincidentally, it has been the practice and experience that these same forces, which through directorships in various corporate enterprises dominate the fiscal and business policy thereof, through the same form of relationship influence or control the sources of wealth necessary for these enterprises, *i. e.*, the state banks, trust companies, national banks, and insurance companies.

This is contrary to public policy, is opposed to business fairness, and opens the door to cupidity and fraud. The important life insurance companies doing business in this country annually receive from their policyholders perhaps more than two thousand million dollars. A very large part of these funds must be, and are, invested by the insurance companies. Trust companies and savings banks receive hundreds of millions of dollars of funds which need to be invested, and the state banks and the national banks likewise are the custodians of the people's fortunes, which must be made to earn through the investment market. It follows that insurance companies or financial institutions having funds to put out for investment, through their representatives who at the same time are directors of the selling company, find opportunity for investment immediately at hand.

This condition is not confined to transactions between railroads and industrial companies on the one hand and insurance companies, trust companies, or financial institutions on the other. Similar practice prevails through similar influences and relations concerning trade and commerce among corporations and enterprises engaged in large business, and particularly such as properly would come under the head of interstate commerce.

The forces influencing and dominating boards of directors of corporations engaged in finance, banking, insurance, railroading, and commerce through common or interlocking directorships, restraining and stifling competition and freedom in business, and denying equality of opportunity to all entitled thereto, abuse and violate the fiduciary relation and trust obligation of directors. Some treatment must be found to cure or destroy the evil.

Is there in the law a remedy? If so, can its enforcement be aided? If not, what further legislation is needed?

I. COMMON-LAW REMEDIES.

The responsibilities and duties of directors and corporations under the law are the same now as they were prior to this era of consolidation. The foundation upon which rest the various elements of power, duty, obligation, and liability of directors is the fiduciary relationship existing between directors and the corporation.

The law-books and the decisions of the highest courts of many of the states and of the United States are replete with text and pronouncements holding that the relationship between a director and the corporation is fiduciary, and that the director for all practical purposes is a trustee, the corporation and its stockholders the *cestuis que trustent*, and the property of the corporation a trust fund.

"The directors of a corporation are ordinarily invested with the most extensive powers of management. They are empowered to represent the company in all of its business transactions and ventures; and the entire corporate affairs are placed in their charge, upon the trust and confidence that they shall be cared for and managed for the common benefit of the shareholders, and in accordance with the provisions of the charter agreement. It is manifest, therefore, that the directors of a corporation occupy a position of the highest trust and confidence, and that the utmost good faith is required in the exercise of the powers conferred upon them."¹

In the case of *Bosworth v. Allen*² it is said:

"While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees. Clothed with the power of controlling the property and managing the affairs of the corporation without let or hindrance, as to third persons they were its agents, but as to the corporation, itself, equity holds them liable as trustees. . . . While courts of law generally treat the directors as agents, courts of equity treat them as trustees, and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct."³

¹ Morawetz on Private Corporations, 2 ed., § 516.

² 168 N. Y. 157, 164, 61 N. E. 163, 164 (1901).

³ See also *Barnes v. Brown*, 80 N. Y. 527, 535 (1880): "It is true that the plaintiff, while

A. *Directors' Disability.*

The fiduciary relationship is so thoroughly regarded as one of trust, that a corporation whose board of directors acts through a quorum of its members will not be permitted to sustain, against protest or objection, any contract or transaction authorized by such quorum, if any director interested in the subject matter of the contract or transaction forms a necessary part of the quorum. The courts, in that respect, hold an interested director to be a stranger to the corporation, and his presence in the meeting as that of a mere bystander, and hence decline to enforce or sustain the action of such a quorum.

The authorities in support of this doctrine are clear, and the language unequivocal.

Thus in *Curtin v. Salmon River Hydraulic Gold-Mining & Ditch Co.*⁴ it is said:

"The same rules which preclude an interested director from uniting with other directors in the creation of an obligation in favor of himself by his vote, forbid him from uniting with them in creating such obligation by any act or exercise of his official position; and a meeting at which there is not a majority of the directors, exclusive of such interested director, is not a competent board for the transaction of any corporate business."⁵

acting as a director of the corporation, held a fiduciary relation to it. He was a trustee of the corporation, and was under the same disability, which attaches to all trustees in dealing with trust property and in transacting the business pertaining to the trust. He could not act as trustee and for himself at the same time, and he would not be permitted to make a profit to himself in his dealings with the corporation. It is against public policy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives."

⁴ 130 Cal. 345, 351, 62 Pac. 552, 554 (1900).

⁵ The court adds: "In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, it was held that a director of a corporation 'cannot properly act on or form part of a quorum to act' on a proposition to increase his compensation.

"In *Van Hook v. Manufacturing Co.*, 5 N. J. Eq. 169, the chancellor said that a member of a corporation contracting with it is regarded, as to that contract, as a stranger, and held that, as the corporation was managed by five directors one director could not, with two others constitute a board to vote a mortgage from the company to himself. This case was afterwards reversed upon other grounds but no dissent from this rule was expressed." See also 2 Thompson on Corporations, §§ 1158, 1159.

A very interesting position has been taken by the courts, both in England and

B. *Voidability of Contracts.*

It has been contended, and with some success, that transactions and contracts of corporations in which a director is interested individually or through other corporate connections are not inhibited, unless the particular transaction is authorized by the board through the vote of the interested director; that such interest is immaterial, if it appears that the interested director is only one of a number, and that his confrères authorized the transaction.

This should not be the rule. We cannot close our eyes to conditions as they are. We do know, in modern practice, that one individual director frequently, if not in a majority of cases, is the dominant force in the conduct of corporate affairs. We do know that banking firms and banking institutions, whose representatives are on the boards of directors of different corporations, have a sphere of influence in the deliberations and decisions of such boards of directors that is not measured by the number of votes, but by the power exerted through relations and affiliations of common interest. In law it should be immaterial how many directors vote in favor of a contract or a transaction in which a director, directly or indirectly, has an interest; it should be set aside, and relief granted to the corporation and its stockholders, even though the interested directors refrain from voting.

in this country, relating to the disability of an interested director, and the right or propriety of his acting as a director when his interest in any transaction or contract with the corporation appears.

In England there is a law — the “Companies Clauses Act” — which provides that whenever it appears that a director of a corporation is interested in corporate matters under consideration by the board of directors, such director, in consequence thereof, is removed from office. See *Aberdeen Ry. Co. v. Blaikie*, 2 Eq. Rep., Pt. 2, 1281, 1291, *et seq.* (1854).

This same subject has been considered in this country, and is referred to in Taylor on Corporations, 4 ed., § 627: “And when a corporate officer finds his personal interests substantially opposed to those of the corporation, then not only on account of the rights of the corporation and his duties to it, but also for the sake of his own security, the plainest course for him is to resign.”

The doctrine is supported in the case of *Goodin v. Cincinnati and Whitewater Canal Co.*, 18 Oh. St. 169, 183 (1868), where it is said: “A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign.”

A case in point is *Munson v. Syracuse, Geneva & Corning R. Co.*⁶ The court says:

"It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract. . . . The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity to enforce the contract, in the making of which he participated. The value of the rule of equity to which we have adverted lies to a great extent in its stubbornness and inflexibility."

The trust relationship existing, there should be no doubt of the rule that a director should not deal with his corporation in any matter in which he is interested, directly or indirectly; be the interest in the transaction individual or that of another corporation in which such director is interested, either as an officer, stockholder, or director.

Though the great weight of authority supports the conclusion that contracts made by corporations, in which its directors are interested, either individually or through their affiliations with other corporations, are not void *ab initio*, but merely voidable, yet the rule of law in this respect is such that for all practical purposes, if the contract or transaction be attacked, it will be avoided almost as a matter of course, because the question of the integrity or the good faith of the transaction will not be inquired into. The courts will not consider whether or not the transaction has been injurious. Indeed, they have gone so far as to hold that even where it could be affirmatively shown that the transaction was beneficial to the corporation, yet, the fact of the relationship appearing, the transaction will be set aside, as contrary to public policy and good morals. The decisions in this respect are uniform, and the language is strong and unmistakable.

In *Aberdeen Railway Co. v. Blaikie*⁷ it is said:

"So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the ces-

⁶ 103 N. Y. 58, 74, 8 N. E. 355, 358 (1886).

⁷ *Supra*.

tuis que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better; but still, so inflexible is the rule, that no inquiry upon that subject is permitted."

And in so late a case as *Brooklyn Heights Ry. Co. v. Brooklyn City R. Co.* the court says: ⁸

"When the adverse interest is made to appear, the law invalidates all contracts made by the trustee or fiduciary, in which the latter was personally interested, at the election of the party that was represented by him or them. The court said: 'The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case.'

"And this rule is applied, even though there be no suggestion of actual fraud in the transaction." ⁹

The rule that contracts of corporations with directors who are interested therein may be set aside, applies also to the case of contracts between corporations having common directors. The authorities hold that corporate transactions authorized and entered into between two corporations through the instrumentality of common or dual directorship may be set aside at the instance of either corporation.

Morawetz on Private Corporations ¹⁰ says:

"It follows, therefore, that the directors, or other agents of the corporation, have no implied authority to bind the company by making a

⁸ 135 N. Y. Supp. 990 (June 7, 1912), quoting from *Munson v. S., G. & C. R. Co.*, *supra*.

⁹ See *Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190, 199 (1881): "Nor is it at all questioned that, in such cases, the right of the beneficiary or those claiming through him to avoidance does not depend upon the question of whether the trustee in fact has acted fraudulently, or in good faith and honestly, but it is founded upon the known weakness of human nature and the peril of permitting any sort of collision between the personal interests of the individual and his duties as trustee, in his fiduciary character." See also *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 274, 26 N. E. 145, 148 (1891).

¹⁰ Sec. 528.

contract with another corporation which they also represent, each company would be interested in obtaining an advantageous bargain at the expense of the other company, and each would have a claim upon the best endeavors of his agents, unbiased by favor to others."

This doctrine was most exhaustively considered in the case of Metropolitan Elevated Ry. Co. v. Manhattan Ry. Co.,¹¹ where in a thorough and well-considered opinion the court said:¹²

"I think, therefore, that the undoubted rule of law in this State is, that every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself. But we are asked, does this disability extend to the case of a contract between two corporations, some of whose directors hold that office in each corporation?

"I can see no difference in principle between the case of a director contracting with his corporation, and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same, the temptations to a breach of trust are the same, the want of independent action exists, and the divided allegiance is just as apparent."

A similar situation was presented for judicial investigation and decision in the very recent case of Globe Woolen Co. v. Utica Gas and Electric Co.,¹³ involving a contract made between two corporations.

In that case the chairman of the executive committee of the complaining corporation had no substantial financial interest therein, but was largely interested in the other party (a corporation) to the contract. At the meeting of the board of directors when the disputed contract was authorized he refrained from voting; nevertheless, his relationship as a director and chairman of the executive committee was regarded as influential and persuasive. The court set aside the contract upon the complaint of the injured corporation, and said:¹⁴

"In the case at bar it is apparent that the plaintiff's president, through his influence in the management of the defendant corporation, and

¹¹ 14 Abb. N. Cas. (N. Y.) 103 (1884).

¹² P. 272.

¹³ 151 N. Y. App. Div. 184, 136 N. Y. Supp. 24 (May 29, 1912).

¹⁴ P. 31.

through his influence as a member of its executive committee, procured or permitted the contracts in question to be entered into, which were of great advantage to the plaintiff, and to himself personally, but which were unduly burdensome upon and altogether unconscionable as to the defendant. . . .

"Nor is it important that plaintiff's president in the transaction in question represented the defendant silently; that he did not openly advocate or vote for the adoption of the contracts. His negotiation of the same implied and carried with it the force and effect of his approval. . . .

The contracts were voidable at the election of the defendant, and so independently of the question whether there was fraud or good intentions on the part of the plaintiff's president in bringing about their consummation."

Also in the case of *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*,¹⁵ the court held invalid and set aside a contract made between two corporations because such was authorized and executed by common officers and common directors.

c. Accountability for Profits.

The authorities do not seriously differ as to the right to vitiate and set aside a contract or transaction entered into by a corporation with a director who is directly or indirectly interested therein; but vitiating the undertaking in many instances may work greater injury to the corporation than affirming it.

It is not necessary to disaffirm such a transaction as a basis for relief. The contract may be affirmed and the officer or directors interested required to account for all profits made.¹⁶

It is the unvarying rule that an agent or a trustee dealing with the property of the principal or *cestui que trust* cannot profit thereby. All directors realizing any profits or benefits from such transactions may be held accountable therefor, and required to surrender them to the corporation.

"Corporate officers may not buy from or sell to their corporation and retain any profits from such transactions, unless the profits are known and the transactions acquiesced in by all who could claim any interest in the profits. For all secret profits derived by them

¹⁵ *Supra.*

¹⁶ Taylor on Corporations, § 631.

from any dealings in regard to the corporate enterprise, they must account to the corporation, even though the transaction may have benefited it." ¹⁷

In *Pepper v. Addicks*¹⁸ the action was by the receiver of the Bay City Gas Company against Addicks, to compel him to pay over certain profits which he was alleged to have made improperly by using the corporate assets for his individual purposes. The court in sustaining the bill says: ¹⁹

"His liability rests upon the fundamental principle that one who occupies a position of trust and confidence — such as the president, or a director, of a corporation — shall never be permitted to abuse his official position by dealing with the corporate property for his private gain. If he so deals, by whatever tortious devices, his acts are voidable if his trail can be followed, and he may be called upon to account for the profits that he has wrongfully made."

And in *Wardell v. Union Pacific R. Co.*²⁰ the United States Supreme Court says:

"Directors of corporations, and all persons who stand in a fiduciary relation to other parties and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which would conflict with the interest of parties they represent, and are bound to protect. They cannot, as agents or trustees, enter into nor authorize contracts on behalf of those for whom they are appointed to act and then personally participate in the benefits." ²¹

¹⁷ Taylor on Corporations, § 629. See also Morawetz on Private Corporations, 2 ed., § 518.

¹⁸ 153 Fed. 383 (1907).

¹⁹ P. 405.

²⁰ 103 U. S. 651 (1880).

²¹ See also *Gilman, Clinton & Springfield R. Co. v. Kelly*, 77 Ill. 426, 432 (1875): "The vital question is, whether it was lawful for any number of the directors of the railroad company to become members and stockholders in the Morgan Improvement Company, with whom they had a construction contract. Whether the contract was originally valid, is not now an important subject of inquiry; for if it was illegal for the directors to become members of the construction company, and participate in the profits, if any should be realized, that fact would establish a right in complainants to have an account taken, as clearly as though the contract, in the first instance, was unlawful. The same conclusion would inevitably follow, and the result, so far as the participating directors are concerned, would be the same.

"We are inclined to adopt the latter view, viz.: that no director could rightfully

The rule that a director may not profit from any transaction with the corporation in which he is interested applies also to a corporation or partnership or association, whose officers, directors, members, or agents are represented in the other company's board of directors.

This is a remedy that is swift and wherein a recovery is reasonably certain, but there may be instances in which legitimate business would be seriously hampered and interrupted if this rule is unreasonably applied. For instance, it might be carried to the extreme of establishing liability for profits by way of interest on loans or deposits of corporations with banks having common directors, or the customary and usual business profits of companies engaged in manufacturing or commercial enterprises, having common directors. The application of the rule to such cases would be unjust and injurious instead of helpful and right. It may be, therefore, that some other rule of recovery should be considered, such as actual damages sustained, or undue profits gained.

Silence of Directors.

Ordinarily, where provision is made in any statute requiring *assent* as a basis for personal liability of a director, the courts have, in giving construction thereto, almost uniformly held it to be necessary that some affirmative act or some positive conduct on the part of a director be established as a basis for liability. But in the case of *Patterson v. Stewart*²² we find that the assent on the part of the director was spelled out of his course of conduct, without any affirmative or positive action being disclosed. The court in that case, after defining what may be regarded as assent, says the following:²³

"This assent, however, need not be express. If a director knew that a violation of law was being or about to be committed, and made no objection, when duty required him to object, and when he had the opportunity of doing so, this would amount to 'assent.'"

become a member of the improvement company, with whom the railroad company had a contract to furnish the means with which to build the road, with a view to share in the profits, and that if any gains should be realized in the enterprise, they would belong to the railroad company, upon the equitable principle which forbids the trustee, or person acting in a fiduciary capacity, from speculating out of the subject of the trust."

²² 41 Minn. 84 (1889).

²³ P. 94.

The force of this ruling becomes apparent in view of the generally accepted doctrine that if a director who is interested in a transaction under consideration by the board be present and bring to bear the influence of his membership, but refrains from voting, his non-action will relieve him from obligation.

Directors should not be permitted to relieve themselves of responsibility by merely remaining silent. It is the duty of the director to disclose to his fellow directors his interest in the transaction in hand as well as all the benefits and advantages accruing to him therefrom. If he cannot or will not do this, he should resign from the board, relieve the directors of the influence of his presence and membership and enable the board to deal with him at arm's length.

This has not been the practice. Generally the interested director is present at the meeting, exerting the influence of his membership in the board, and then seeks to relieve himself of responsibility by having the record show him "not voting."

This case of *Patterson v. Minnesota Manufacturing Co.* deals with the situation in a way that should put an end to this circumvention of the legal consequence by silence, construing such conduct of a director into an assent, and visiting upon the interested director the consequences either of having the transaction set aside, if the corporation sees fit to do so, or of holding the director liable for whatever profits may come to him as a result of that undertaking.

It is the right of every corporation to have disinterested counsel and unbiased discussion from every director; and it is his duty to those who are not informed to disclose fully his interest in and knowledge concerning any transaction before the board of directors for action.²⁴

II. PROPOSED STATUTORY REMEDIES.

Proceedings against officers and directors of corporations arising out of contracts and transactions of the company in which such officers or directors were interested have been very infrequent.

²⁴ The following pertinent language in this regard from *Aberdeen Ry. Co. v. Blaikie*, *supra*, p. 1287, is applicable: "It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear upon the subject."

Although the last fifteen years of corporate organization and management are replete with transactions of the character condemned under the rules dealing with fiduciary relations, yet the records of the courts are singularly free of actions of this kind. Why is this so? The answer is not difficult to find.

First. The stockholders and parties in interest are kept in ignorance of the transactions and proceedings of the company, especially of the matters in which the directors, directly or indirectly, are interested.

Second. The stockholders are unable to produce the necessary evidence to substantiate any complaint and are consequently disinclined to proceed.

Third. Even if possessed of knowledge and information and the necessary evidence to prove the charge, yet there is failure to act, due to fear of reprisal; or to intimidation from sources of power and influence; or to timidity because of possible injury resulting from unknown directions; or to apprehension of the untoward consequences which may befall one who complains, at the hands of those forces and affiliated interests which through common directorships and interlocking relations can wield unlimited power for retaliation and destruction.

It is necessary to find the means and machinery to deal effectively with such a situation.

(a) The first remedy to prevent unjust discrimination and avoid undue advantage is to enact laws, national and state, forbidding any person who is a bank director to be either an officer or director in another bank or in any insurance company or in any railroad or industrial company with which his bank has interests which may conflict or business relations of a fiduciary character, and this should apply to those who are members of banking firms or financial institutions; and it should also be the rule that no person who is a director or officer of any corporation shall be a director in any other company with which it has relations of such a character as to tempt or induce or make possible a violation or disregard of the fiduciary responsibility which such a director or officer would owe to both corporations.

Apropos of this, Mr. Justice Field said, in *Wardell v. Union Pacific R. Co.*:²⁵

"It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and constituted as humanity is, in the majority of cases duty would be overborne in the struggle."

(b) There should be legislation which will prohibit any railroad company, insurance company, bank, trust company, or industrial company, establishing or permitting an exclusive or sole fiscal agency or relationship, which will either prevent or lessen freedom of competition in any and all corporate transactions.

(c) There should be legislation requiring the president of every corporation to make report annually to the stockholders, of every contract made by the corporation in which any director has any interest, directly or indirectly, or with any corporation of which any of its directors is a member and has any interest, setting forth the contract and the exact nature of the transaction, and covering in detail the undertaking and its terms and conditions. This report should be sworn to by the president of the company, and untruthfulness therein should be punishable as for perjury. A duplicate copy of such report should be properly verified, and filed with the Comptroller of Currency and Interstate Commerce Commission at Washington, and with a similar body in the state where the company has its principal executive office.

These reports should be referred to the Attorney-General of the United States or of the state, as the case may be, whose duty it shall be promptly to make examination thereof, and if there are therein disclosed contracts and transactions in which directors are interested or in which some other corporation or partnership or association, represented on the corporation's board of directors, is interested, take prompt action to vitiate all such contracts and transactions and recover any damages sustained, or if deemed wise, without disaffirming the contract or transac-

²⁵ *Supra.*

tion, proceed against the interested directors, corporation or partnership for all profits derived therefrom.

(d) For failure of the president of the corporation to make the report, he should be made liable for any damages suffered by the corporation, and also adjudged guilty of a misdemeanor, with severe penalties.

(e) To assure further against failure or neglect to make such reports, it should be made the duty of every state and national bank examiner and every state superintendent of insurance and the Interstate Commerce Commission to examine the records of every bank and every insurance company and every trust company, and every railroad company and every corporation engaged in interstate commerce, including the minutes of the stockholders' and directors' proceedings, and upon it appearing that any contract or transaction had been entered into, in which any director was interested, or with a corporation or partnership or association, in which a director was interested, that fact should be brought to the attention of the attorney-general of the state in case of a state institution, and the Attorney-General of the United States where the corporation is within the federal jurisdiction, whose duty it should then become instantly to proceed, as above suggested.

(f) It should be made the duty of the corporation, acting through its officers and directors, upon its own initiative, and without the necessity of prior request from stockholders, to set aside and annul any transactions, contracts, and undertakings with a director or in which any director has any interest, whether individually or for the benefit of any firm of which he is a member, or with which he is connected, or of any corporation in which he is interested or of which he is a director, and recover from such director or such firm or such corporation, any damages sustained; or, if the interests of the company require, affirm the transaction and proceed against such director or such firm or corporation to recover, by enforcement of personal liability, all profits secured in such transaction, unless such contract or transaction has been reported to the stockholders and by them approved. That duty should be an active one, and if the officers and directors fail to assert the rights of the corporation in that regard, they should be made liable for any damages which the corporation may sustain by their inaction and failure in that regard.

Legislation Supporting such Procedure.

In the course of our investigations we have found legislative action by the state of New York as long ago as the year 1825 providing some of the remedies above suggested for dealing with the existing vulnerable practice. Means for relief were there afforded to injured corporations or stockholders without the interposition of some individual, who either as stockholder or otherwise had been the victim of improper and illegal corporate transactions and who, because of fear of possible reprisals or attack by powerful interlocking interests, could not risk independent action.

The attorney-general of the state of New York under that law not only was empowered, but it was his duty, in behalf of the people of the state to bring to account corporations and the officers and directors of corporations transgressing and violating their duties and obligations.²⁶

²⁶ See N. Y. Rev. Stat., 1775, Pt. 3, c. 8. The following sections are applicable to this subject:

"Sec. 33. The chancellor shall have jurisdiction over directors, managers, and other trustees and officers of corporations.

"1. To compel them to account for their official conduct, in the management and disposition of the funds and property committed to their charge:

"2. To decree and compel payment by them, to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves, or transferred to others or may have lost or wasted, by any violation of their duties as such trustees:

"3. To suspend any such trustee or officer from exercising his office, whenever it shall appear, that he has abused his trust:

"4. To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct:

"5. To direct new elections to be held by the body or board duly authorized for that purpose, to supply vacancies created by such removal:

"6. In case there be no such body or board, or all the members of such board be removed, then to report the same to the Governor, who shall be authorized, with the consent of the senate, to fill such vacancies:

"7. To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving alienation, knew the purpose for which the same was made: and,

"8. To restrain and prevent any such alienation in cases where it may be threatened, or there may be good reason to apprehend it will be made.

"Sec. 35. The jurisdiction conferred by the preceding thirty-third section shall be exercised as in ordinary cases, on bill or petition, as the case may require, or the

On several occasions this legislation was the subject of judicial inquiry, and received very thorough investigation and consideration; and the right and duty of the attorney-general to act on his own initiative was finally sustained in two well-considered and most thoughtful opinions in the case of *People v. Ballard*.²⁷ Attention is drawn to the following language from the opinion of Justice Vann:

"Has the state no interest in supervising the conduct of its creatures to whom it has confided such great power? In a broad and political sense, has it no interest in requiring the managers of corporations to observe their charters, and not abuse their powers? Has it no interest to prevent, by the deterrent effect of example in a flagrant case of wrong, similar violations of law by those managing other corporations? May not the Legislature have thought that sound public policy required not only remedies for the redress of private wrongs to be enforced at the instance of those injured, but also the direct interference by the state whenever, according to the sound judgment of a discreet and conservative public officer, it was necessary, in order to arrest a growing evil? These questions, we think, suggest an answer to the argument founded on the supposed improbability that the Legislature would depart from the usual rule of requiring a direct interest to support an action. No such interest was regarded as necessary in order to annul a charter, dissolve a corporation, remove a receiver, or oust a usurper. With great deference to the learned judges who have reached a different conclusion, and whose opinions have caused us to hesitate long and anxiously before pronouncing judgment, we think that this action, if otherwise well founded, can be maintained by the attorney-general in the name of the people alone."

In 1880 this Act of 1825 was repealed.²⁸ But in the year 1909 a number of the important provisions of the repealed legislation were reenacted, and, so far as applicable to this subject, are found incorporated in sections 90 and 91 of Article V of the General Corporation Law of the state of New York. Though the powers of the

chancellor may direct, at the instance of the attorney general prosecuting in behalf of the people of this state, or at the instance of any creditor of such corporation, or at the instance of any director, trustee, or other officer of such corporation having a general superintendence of its concerns."

²⁷ 134 N. Y. 269 (1892). One of these opinions was by Justice Peckham, thereafter one of the judges of the United States Supreme Court, and appears by way of footnote at page 272. See especially pp. 283, 284.

²⁸ See New York, Laws of 1880, c. 245.

attorney-general are considerably circumscribed, yet this law as it stands is available and useful for remedy and relief against many of the existing abuses, and can be made the basis of further legislation on the subject.²⁹

Generally speaking, the state should not interfere in the affairs of a purely private corporation, and the exercise by the attorney-general of the broad powers conferred should be wisely defined so as to prevent undue activity except in extreme cases, as is clearly stated by Justice Peckham in *People v. Ballard*:³⁰

²⁹ N. Y. Consol. Laws, c. 23 (Laws of 1909, c. 28) § 90. "*Action against officers of corporation for misconduct.*—An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

"1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property committed to their charge.

"2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

"3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

"4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election, to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

"5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

"6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

"7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of the code of civil procedure.

"As to any litigation pending prior to September one, nineteen hundred and seven, the provisions of this section as they existed prior to that date shall apply."

"Sec. 91. *Who may bring such an action.*—An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the state, or, except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager or other officer of the corporation, having a general superintendence of its concerns."

³⁰ 134 N. Y. 269, 286, 287 (1892).

"Where the corporation is a purely private manufacturing, trading, or other business corporation, the case would, as we think, have to be a most extraordinary one to warrant the attorney-general in the interests of the public in bringing an action to set aside alleged illegal transfers of property in which the people had no interest, and a recovery in which would benefit only those who claimed to own the property or some part or portion or interest therein."

But as to transactions and affairs of corporations having vast interests and charged with responsibilities to the public, and in connection with which the powers of visitation are granted by the state and nation, such as insurance companies, banking corporations, trust companies, and railroads, and other corporations engaged in interstate commerce, the right and duty and the power of the attorney-general to interfere for the protection of the corporation and its stockholders and the public interest should be as comprehensive as possible. And was it not that class of corporations which Justice Vann had in mind when writing his opinion in *People v. Ballard*?

The public has a very lively interest in railroads, in public utilities, in banks, in insurance companies, and the very large enterprises engaged in interstate commerce. Their affairs concern not only stockholders, but the people. Such public interest has been recognized by the state and nation in exercising supervisory control over banks and trust companies through the banking departments, over the insurance companies through the insurance department, over public utilities through the public service commissions, and over the railroads through the interstate commerce and railroad commissions.

It is only one step further, and a proper step, to permit the law officer of the state or nation, as the case may be, in the interest of corporations charged with a public interest and owing duties to the public, and in the interest of the stockholders, upon his own initiative, to undo illegal acts and transactions of the corporations and to redress wrongs committed by the officers, directors, and managers thereof.

The fear of unseen danger to a stockholder seeking openly to protect the corporation and himself would be dispelled, and the menace of reprisal and retaliation at the hands of concentrated or affiliated power would be avoided, by the enforced reports

required to be made by the president to the stockholders and filed with the proper public authorities; and relief secured through action by the attorney-general without the necessity for independent action by stockholders or other injured persons.

A similar question was presented to the Supreme Court of Wisconsin in the case of *State v. Milwaukee Electric Railway & Light Co.*³¹ The court there declined to follow *People v. Ballard*, because the statute of Wisconsin differed from the New York statute and specifically provided "that every action shall be prosecuted in the name of the real party in interest."

The Supreme Court of the United States considered the subject by analogy in the case of *United States v. Union Pacific R. Co.*,³² which was based on a special act of Congress directing the action taken.

III. IS THE SHERMAN ACT APPLICABLE?

Another remedy for dealing with this very serious subject, which is submitted for consideration, is to invoke the benefit of the Sherman Anti-Trust Law. The conditions existing and here considered deal in a way with a subject coming within the operation of the Sherman Act. There exist through the instrumentality of common or dual directorships in various corporations, such as state banks, national banks, trust companies, insurance companies, and railroad companies, and their bankers and fiscal agents, combinations or understandings by which the fiscal and business policy of such corporations relating to the issue and negotiation of securities are controlled. This is evidenced by the establishment of exclusive fiscal agencies and by a well-recognized and persistent course of conduct under which securities are issued and marketed without competition. The vast fortunes available for investment should be accessible to the demands of business requirements throughout the land, and not confined largely to those bankers and financial institutions constituted the fiscal agencies and issuing houses under the dominating influence of interlocking interests and directorships. The thousands of millions of funds contributed by the inhabitants of this country to insurance companies, savings

³¹ 136 Wis. 179, 160 N. W. 900 (1912).

³² 98 U. S. 569 (1878).

banks, and trust companies are largely turned over to these same banks and banking institutions and fiscal agencies for investment in securities the issue of which they themselves control by reason of their relation to the issuing corporations, without competition. The issuing company should be afforded a competitive market for its securities by public offer or otherwise. Likewise, the investing company should be enabled to invest its funds freely in all directions instead of turning them over by the millions without competition from any source.

It may be said that the Sherman Act cannot be availed for the reason that the negotiation of securities is not interstate commerce, even when issued by corporations engaged in interstate commerce. This is true, but if the securities issued and the funds supplied are for the express purpose of, and use in, the operation of railroads and corporations engaged in interstate commerce, — in the case of railroads for the purchase of rails, for the building of roads, for the purchase of cars and equipment, all of which are used in interstate commerce, and in the case of industrial and commercial enterprises engaged in interstate commerce, in connection with the manufacture and sale and delivery of commodities through the channels of interstate commerce, — then the Sherman Act might be invoked. For instance, "car trusts" or "equipment notes" are obligations expressly issued and negotiated to pay for cars and equipment to be used to carry on and conduct interstate commerce.

In *Mondou v. New York, New Haven & Hartford R. Co.*³³ we have a definition of interstate commerce which shows the comprehensiveness of its application. The Supreme Court there quoted with approval from the brief prepared by Lloyd W. Bowers, Esq., then Solicitor-General of the United States, the following:

"Interstate commerce — if not always, at any rate when the commerce is transportation — is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed

³³ Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 174 (1912).

while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or, in the exercise of a fair legislative discretion, can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act."

We do not want to be understood as advocating the immediate availability of this remedy, but we do insist that there is apparent a condition, participated in by various institutions, individuals, and agencies through their representation on the boards of directors of banks and trust companies and insurance companies and in railroads, manufacturing companies and in industrial and commercial enterprises working together through exclusive fiscal and business agencies and through a consistent and long-continued course of conduct, apparent in the daily financial and business operations and practices of the large corporate interests and enterprises, which irresistibly leads to the conclusion that business freedom and equality of opportunity are seriously hindered and stifled through the domination of interlocking interests represented by common and dual directorships, and that this condition needs attention and correction.

CONCLUSION.

The uniform rule that the fiduciary relation of a director constitutes him for all practical purposes a trustee; the jealousy with which courts scrutinize every transaction in which a trust relationship exists; the legal presumption of fraud in every transaction in which a director is interested,—assure relief in the courts. Contracts made with a director, or in which he is interested either directly or as the representative of an interested party to the contract, will be subject to vitiation instantly the relationship of

the director to the transaction is disclosed, and at the election of the complaining corporation damages sustained may be recovered or the transaction may be affirmed, and all profits derived therefrom accounted for. The heaven of personal liability on the part of directors is a most potent corrective of the objectionable practices. There are, therefore, various forms of relief available under the law as it now stands.

It may be said that the enforcement of personal liability would produce a prevalence of dummy directors. It is likely that here and there such a subterfuge may be successful, but the success would only be temporary. Vigilant investigation and vigorous prosecution would soon turn up the undisclosed principal. That done, the remedy against both the dummy director and his principal will be swift and certain.

"In America the relation of the real owner to the 'dummy' is held to be that of principal and agent, and the principal is held liable on the ground that an undisclosed principal is liable on the contracts of his agent." ³⁴

The public is not in a mood to tolerate subterfuge in dealing with trust relationships. Before the power of awakened public opinion, cupidity hesitates and recreancy disappears.

The surest remedy, however, for combating and overcoming the abuse of the fiduciary relation of directors, whether through the power and influence of interlocking interests represented by common and dual directorships, or otherwise, lies in publicity and in public vigilance. Publicity of all corporate transactions in which any director is interested, either directly or as the representative of some other corporation or interest, through reports by the officers as above suggested, supplemented by the investigation and examination of all corporate records by the proper bodies having visitatorial power, either state or national, will serve quickly and materially to lessen and retard existing abuses of the fiduciary relation of directors.

Vigilance on the part of the law officers of the state or nation, and vigorous prosecution to set aside and undo illegal and improper

³⁴ 1 Cook on Corporations, 6 ed., § 253. See *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. 1006, 1013 (1895), where it is said: "A stockholder cannot escape liability by the use of the name of a dummy."

corporate transactions, coupled with the infliction of such penalties as the law affords, whether by enforcing personal liability against those responsible for abuses and violations or invoking more drastic prosecutions, will serve ultimately to prevent the continuation of officers' and directors' indifference to and disregard of their obligations of trust.

No director is true to his obligation of trust who permits his action as a director to be controlled by influences and forces whose interests do or may, or allows his personal interest to, conflict with those of his corporation. Lack of publicity and lack of vigilance must be charged largely with the responsibility for the violations of the fiduciary relation of directors. To preserve a wholesome respect and a high regard for the trust reposed in those who have the charge and the management of trust property, there must be sustained public vigilance. The vigorous pursuit of the remedies already afforded in the law; the inhibition of dual or interlocking directorships; the enforced publicity of corporate actions and transactions in which directors are interested either directly or representatively; vigilance by the proper authorities in state and nation; the vigorous prosecution of corporate abuses,—can and will end the recreancy and improper practices developed in the last decade, establish a proper appreciation of the obligations resting upon those occupying fiduciary positions, stimulate a proper regard for the trust and confidence reposed in a trustee, bring a higher standard of business practice, and win back — what is now lacking — the confidence of our people in the integrity and reliability of our men of affairs.

Many of the abuses and conditions calling for correction might have been, and could still be, avoided without governmental interference. The business interests of the country are quite capable of dealing effectively with the situation, though they have not heretofore done so. Failing in effort to set right the abuses and illegal practices so generally indulged in, the only recourse left to curb or cure existing economic evils is to invoke the aid of legislative and governmental intervention.

Max Pam.

SOME NECESSARY AMENDMENTS OF THE NEGOTIABLE INSTRUMENTS LAW.¹

IT is not intended in this article to suggest all the amendments which might be made for the improvement of the Negotiable Instruments Law or for the correction of mistakes in the act, but only to discuss such changes as seem to be most necessary.

First. The question whether an instrument payable in "currency" or in "current funds" is payable in money has given rise to much conflict of authority. On one side are the cases which construe the words "currency" or "current funds" to mean legal tender or such currency as, although not legal tender, yet circulates actually and lawfully at par with coin, and therefore to make the instrument payable in money. On the other side are cases in which it is held that any currency or current funds may be tendered in payment whether at par or not, and that the instrument is therefore not payable in money.² If the former construction is put upon the words "currency" or "current funds," no objection can be made to regarding the instrument as payable in money, for the amount to be paid is certain. The Negotiable Instruments Law leaves the question unsolved, for in section 6-5 it is simply provided that the validity and negotiable character of an instrument is not affected by the fact that it "designates a particular kind of current money in which payment is to be made." What is meant by "current money"? or rather what is meant by "money"? Does it include not only gold and silver coin but also bank notes, treasury notes and gold and silver certificates? All of them are current and are popularly spoken of as money, but they are not all legal tender.

It has been suggested that the last paragraph of section 6-5

¹ Because of the great diversity in the sectional numbering of the act as adopted in the different states, it has been thought best to use in this article the numbers as they appear in the act as recommended by the Commissioners on Uniform Laws. The corresponding sections of the act in the various states can be found in the Table in Brannan's Negotiable Instruments Law, p. xxii.

² For a fuller exposition of these differences, see an article in 24 Banking Law Journal, 177.

might be amended so as to read, ". . . is payable in currency or current funds or designates a particular kind of current money in which payment is to be made." This amendment will make an instrument having the other required formal requisites and payable in currency or current funds negotiable in the states in which the Negotiable Instruments Law is adopted. But it is submitted that such an instrument may not have a uniform value in all such states. For the question still remains what is meant by "currency" or "current funds;" and here the courts will decide as they have done in the past. Indeed the Supreme Court of Iowa³ since the adoption of the Negotiable Instruments Law has held, although without referring to the act, that a check payable "in current funds" is not negotiable. The court followed former decisions based on the interpretation of the words "current funds" as including any currency although it might not be at par with coin.

In order to make instruments payable in "currency" or "current funds" not only negotiable but of uniform value, the words in question ought to receive the same interpretation everywhere. This can be done by making section 6-5 read as follows:

"(5) Is payable in currency or current funds or designates a particular kind of current money in which payment is to be made. The words 'currency,' 'current money,' or 'current funds' shall mean such circulating media as are legal tender or are lawfully and actually circulating at par with legal tender at the time and place of payment."

Second. Section 29⁴ should be amended by substituting the words "one who is in other respects a holder in due course" for the words "a holder for value," so that the section will read as follows:

"Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to *one who is in other respects a holder in due course*, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

³ Dille v. White, 132 Ia. 327, 109 N. W. 909 (1906).

⁴ Section 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

It is well settled, and rightly so, that knowledge of the fact that a party to a negotiable instrument has signed it for the accommodation of another is no defense as against one to whom it has been negotiated for value before maturity, for by such negotiation the very object of the signing has been accomplished. When the accommodating party signed the instrument his purpose was to lend the use of his name to enable the accommodated party to obtain money, goods, or credit, and when that has been done by the negotiation of the instrument, it would not only be unjust but wholly contrary to the intention of the parties to permit the accommodating party to defend on the ground of no consideration as between himself and the party to whom he lent the use of his name.

It is also settled that when an accommodation instrument has been paid at maturity by the accommodated party, it cannot be again negotiated after maturity even to a purchaser for value without knowledge of its accommodation character so as to hold the accommodating party, although there is an English case which implies the contrary, provided a new stamp is put upon the instrument to satisfy the requirements of the English Stamp Act.⁵ But, when the first negotiation of an accommodation instrument takes place after maturity, a different question arises upon which there is a conflict of authority in this country, some jurisdictions following the English cases which make no difference between a first negotiation after maturity and a first negotiation before maturity as regards the liability of the accommodating party, while other American courts repudiate the English cases as not in accord with mercantile understanding.

Two of the judges in the last⁶ of the three cases which established the English rule decided the case only on the authority of the two earlier cases⁷ and expressed doubt of the correctness of the rule. In this country the earliest cases followed the English courts with little or no consideration.⁸ These cases were subsequently overruled.⁹ But in the meantime, some other American

⁵ *Lazarus v. Cowie*, 3 Q. B. 459 (1842).

⁶ *Sturtevant v. Ford*, 4 M. & G. 101 (1842).

⁷ *Charles v. Marsden*, 1 Taunt. 224 (1808); *Stein v. Yglesias*, 3 Dowl. P. C. 252 (1834).

⁸ *Brown v. Mott*, 7 Johns. (N. Y.) 361 (1811); *Grant v. Ellicott*, 7 Wend. (N. Y.) 227 (1831).

⁹ *Chester v. Dorr*, 41 N. Y. 279 (1869).

courts had adopted the English rule upon the authority of the English cases and the two early New York cases since overruled. Some other American courts even after the overruling of these cases continued to cite them, apparently without being aware that they had been overruled. In one such case¹⁰ the court also relied on and quoted from the decision of the lower court in *Chester v. Dorr*,¹¹ without noticing the fact that the Court of Appeals had reversed the lower court.

On the other hand, other jurisdictions in this country have repudiated the English rule and have held that an accommodation instrument negotiated for the first time after maturity cannot be enforced against the accommodating party even though the purchaser paid value for the instrument and without knowledge of its accommodation character.¹²

The American cases which refuse to adopt the English rule proceed upon the theory that when an accommodation instrument is given, it is the expectation and understanding of the parties that the accommodated party shall take care of it at maturity. It is submitted that this is the merchant's view of the case and that such view is entirely inconsistent with the idea that the instrument may be negotiated for the first time after maturity.

Again, the accommodating party should be entitled to pay his note according to its terms, that is, at maturity, in case it is not taken care of by the accommodated party, and he may be seriously injured by not having that opportunity. At the time of maturity, the accommodated party may have property on which the accommodating party can make an attachment or execution against the accommodated party, while at the time the note is negotiated or at the time when the accommodating party is called upon to pay it, it might be impossible to recover anything from the accommodated party.

The English rule involves the possibility that the instrument may be negotiated for the first time years after it has been signed, and after the accommodating party has wholly forgotten about it, for, not having received notice at its maturity, he would

¹⁰ *First Nat. Bank v. Grant*, 71 Me. 374 (1880).

¹¹ *Sub nomine Harrington v. Dorr*, 3 Rob. (N. Y.) 275, 283 (1865).

¹² A collection of English and American cases can be found in the article by Professor Hening, 59 U. of P. Law Rev. 471, 486, n. 46-48.

naturally think, and would be entitled to think, that if negotiated, it had been taken care of by the accommodated party, or that it had never been negotiated. Yet, according to the English rule, he would be liable upon it, if it should be negotiated at any time within the statute of limitations (from six to fifteen years according to the jurisdiction) and suit be brought on it within that period. This would certainly be shocking to any business man.

When a man lends the use of his name to another by signing a bill or note payable at a certain time, it seems in accord with common sense to interpret the fixing of a definite time for payment as meaning an intention to limit the use of the name for the time mentioned in the instrument. This is true not only of the maker or acceptor but the conclusion is irresistible in the case of an accommodation drawer or indorser, for here the very terms of his contract are to pay if the instrument is presented at maturity to the party primarily liable and due notice of dishonor is given to the drawer or indorser. An accommodation drawer or indorser is entitled to the same diligence on the part of the holder as if the instrument had been drawn or indorsed for value; that is, he is entitled to have the instrument presented at maturity to the party primarily liable and due notice of its dishonor given to him.¹³ To say that the drawer or indorser is liable upon an instrument negotiated for the first time after its maturity is absolutely inconsistent with the contract of the drawer or indorser because the instrument in such case is not and cannot be presented for payment at maturity.¹⁴ If the English courts had had to face this question, they could hardly have argued as they did in the cases which established the English rule. In all those cases, the defendant was an accommodation acceptor, except one, and there he was acceptor of one instrument and maker of another.¹⁵ The writer's view as to the understanding of business men has been confirmed by consultations with a number of bankers, who were unanimous in their opinions.

The Supreme Court of Wisconsin in a recent case¹⁶ has held that under section 29¹⁷ of the Negotiable Instruments Law an

¹³ See 1 Am. & Eng. Encyc. Law and Practice, 526, note 23, for a large number of cases English and American in support of this proposition.

¹⁴ *Chester v. Dorr*, 41 N. Y. 279 (1869).

¹⁵ *Parr v. Jewell*, 16 C. B. 684 (1855).

¹⁶ *Marling v. Jones*, 138 Wis. 82, 119 N. W. 931 (1909).

¹⁷ Section 29. An accommodation holder is one who has signed an instrument as

indorsee who pays value for an accommodation note, with knowledge of the accommodation, may recover against the accommodating maker, even though the negotiation was the first one and was after maturity, and the learned author of an able article commenting on certain sections of the Negotiable Instruments Law¹⁸ upholds the judgment of the Supreme Court of Wisconsin as to the construction of the statute.

This construction of section 29 is based chiefly on the contrast between the use of the phrase "holder for value" in section 29 with the phrase "holder in due course" used in section 28.¹⁹ There is force in this argument, but it leads to absurd and unjust results, for the effect of it is to dispense with the necessity of the holder being a holder in due course in any respect except as to the giving of value. If the argument is sound, then the holder for value of accommodation paper occupies a position superior to that of any other purchaser of negotiable paper, since there is no other requirement for his recovery except that he be a holder for value. He will not be subject to any of the conditions prescribed by section 52²⁰ except that he shall have given value for the instrument.

If the Supreme Court of Wisconsin is right, then any one who pays value for an accommodation instrument will be able to recover upon it even if the instrument was not complete and regular upon its face. It might have been obtained by fraudulent representations or by threats or undue influence. It might have been given upon an illegal consideration, *e. g.*, given to effect a violation

maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to the holder for value notwithstanding such party, at the time of taking the instrument, knew him to be only an accommodation party.

¹⁸ Professor Hening in 59 U. of P. Law Rev. 471, 532.

¹⁹ Section 28. Absence or failure of consideration is a matter of defense as against any holder not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

²⁰ Section 52. A holder in due course is a holder who has taken the instrument under the following conditions:

- (1) That it is complete and regular upon its face;
- (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;
- (3) That he took it in good faith and for value;
- (4) That at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

of the liquor law or to furnish a house of prostitution or to aid in a burglary or a murder. It might have been signed in blank with an agreement that it should be filled up for a certain sum, and yet be filled up by or in the presence of the transferee for a larger sum.

In all these cases under the interpretation of the Wisconsin court, the purchaser for value, although cognizant of the conditions under which the paper was executed, is entitled to recover because he is a holder for value and need not be a holder in due course. Again, an agreement between the accommodated party and the accommodating party that the instrument should not be negotiated after maturity would be no bar to recovery even though such agreement was known to the purchaser after maturity. Even in the English cases²¹ and all the American cases except one²² which adopt the English rule, such an agreement would be an equity attaching to the instrument in case the first negotiation was after maturity, but if the transferee need not be a holder in due course, he would not be affected by this agreement provided only that he hold for value. If it was really intended to make an accommodation note fully negotiable after maturity so as to cut off the defense of the accommodation party, why was it provided in section 58, which is not in the Bills of Exchange Act, that

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable"?

This provision is so absolutely irreconcilable with the interpretation put on section 29 by the Wisconsin court as to justify the

²¹ *Charles v. Marsden*, 1 Taunt. 224 (1808); *Stein v. Yglesias*, 3 Dowl. P. C. 252 (1834); *Sturtevant v. Ford*, 4 M. & G. 101 (1842); *Parr v. Jewell*, 16 C. B. 684 (1855).

²² In *Naef v. Potter*, 226 Ill. 628, 80 N. E. 1084 (1907), a case upon an instrument made before the adoption of the Negotiable Instruments Law, the court without citing any cases on the point held that the transferee after maturity with knowledge of the fact of accommodation but without knowledge of the agreement not to negotiate the instrument after maturity could nevertheless recover against the accommodating party. It would now be otherwise in Illinois, since section 29, as adopted in Illinois, has an additional clause which restricts the transfer after maturity to cases where there is proof that "a transfer after maturity was intended by the accommodating party." But in other states which have not so changed section 29 before adopting the act such agreement would be no defense even if known to the person to whom the instrument is negotiated.

belief that the phrase "holder for value" was used in section 29 without full appreciation of the possible inference from such use.

It may be urged that the foregoing argument tends to show not that an amendment of section 29 is necessary, but merely that the construction of the section by the Wisconsin court is erroneous. But when not only a Supreme Court but also a learned teacher and writer interpret the section in the same way, is it not probable that other courts will follow their lead? It is submitted therefore that it is the part of wisdom to remove all doubt by an amendment which will prevent the possibility of a construction which produces a result so contrary to mercantile understanding, and which will lead to such mischievous consequences as have been above described.

Third. Section 40²³ should be repealed. In the case of *Smith v. Clarke*²⁴ it was held that the *bonâ fide* holder of a bill indorsed in blank acquired the legal title by such indorsement in blank and that he might strike out the names of all intermediate indorsers, whether such indorsements were special or not, and hold the acceptor on the bill merely by proving the handwriting of the payee. The theory of the case was that the indorsement of the payee in blank made the bill payable to bearer and no subsequent holder could restrain its negotiability.²⁵

The English Bills of Exchange Act did not adopt the rule of *Smith v. Clarke* but, on the contrary, abrogated it, for by section 8 (3) it provided that

"a bill is payable to bearer which is expressed to be so payable or *on which the only or last indorsement is in blank.*"

It is obvious that where the last indorsement on a bill or note payable to order is a special indorsement, the instrument is not payable to bearer, under this sub-section and that section 8 (3) of the Bills of Exchange Act altered the law. Judge Chalmers, the draftsman of the act, says that this sub-section

"was intended to bring the law into accordance with the mercantile understanding by making a special indorsement control a previous indorsement in blank."

²³ Section 40. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

²⁴ 1 Esp. 180; S. C. Peake 225 (1794).

²⁵ Pollock, C. B., in *Walker v. Macdonald*, 2 Exch. 527, 532 (1848).

The Negotiable Instruments Law in section 9-5²⁶ copies section 8 (3) of the Bills of Exchange Act with slight unimportant changes in phraseology, thus denying the principle of *Smith v. Clarke*. Yet section 40 reenacts *Smith v. Clarke* and was so understood by the draftsman, who cites *Smith v. Clarke* in support of the section.²⁷ The repugnancy of section 40 to section 9-5 was clearly pointed out by Professor Ames in his articles criticizing the Negotiable Instruments Law.²⁸ Judge Brewster made some unavailing attempts to uphold section 40.²⁹ Mr. McKeehan in his able review of the controversy between Professor Ames and Judge Brewster suggested³⁰ that sections 9-5 and 40 might be reconciled by limiting the operation of section 40 to instruments originally payable to bearer or subsequently made so by indorsement to bearer, and in support of that theory he said that *Smith v. Clarke* and all the cases following it involved instruments payable to order and indorsed in blank by the payee.

But it is submitted that the mercantile understanding that if an instrument payable to bearer is indorsed specially, the indorsement of the special indorser should be necessary for negotiation applies equally to instruments expressly payable to bearer and to instruments payable to order and indorsed in blank, and the opinion of bankers consulted by the writer and by his colleague Professor Williston was unanimous to this effect. And the convenience of the holder in being able to restrict negotiation by a special indorsement is as desirable in one case as in the other.

In the second place, it is not quite true that in all the cases following *Smith v. Clarke* the instrument was payable to order. In *Johnson v. Mitchell*³¹ a note payable to "A. or bearer" was specially indorsed by A. to C. The plaintiff D. sued on it without an indorsement by C. and was allowed to recover without proof of any assignment by C. and *Smith v. Clarke* and other similar cases were cited and relied upon by the court. It is to be observed that *Johnson v. Mitchell* is also cited by Mr. Crawford under section 40.

²⁶ The instrument is made payable to bearer "1. When it is expressed to be so payable, or . . . 5. When the only or last indorsement is an indorsement in blank."

²⁷ Crawford, *Negotiable Instruments Law*, 3 ed., 55.

²⁸ Brannan, *Negotiable Instruments Law*, 2 ed., 169, 196, 297.

²⁹ Brannan, *Negotiable Instruments Law*, 2 ed., 185, 207.

³⁰ Brannan, *Negotiable Instruments Law*, 2 ed., 234-241.

³¹ 50 Tex. 212 (1878).

It would seem clear that the inconsistency between section 9-5 and section 40 was overlooked when the act was drawn and adopted, and that section 40 should be repealed.

Fourth. Section 30³² should be amended so as to read

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery, *unless the only or last indorsement upon it is a special indorsement. In that case*, or if the instrument is payable to order it is negotiated by the indorsement of the holder completed by delivery."

This amendment is necessary in order to reach the result sought to be obtained by the repeal of section 40, and to bring the law into conformity with mercantile understanding and convenience by requiring the indorsement of a subsequent special indorsee to the negotiation of the instrument whether it be expressly payable to bearer or payable to order and indorsed in blank.

Fifth. Section 58³³ should be amended so as to read as follows:

"Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument *or had not previously been a holder with notice and subject to the defense of such fraud or illegality*, has all the rights of such holder in due course in respect of all parties *liable to the latter except intervening indorsers.*"

It is perfectly well settled that where the holder of a negotiable instrument has transferred it and subsequently re-acquired it, he is remitted to his old position just as if everything which had taken place since his transfer had been wiped out. In consequence of this rule, it follows that when such former holder was subject to any defense in favor of parties prior to himself, he cannot better

³² Section 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

³³ Section 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

his position by transferring the instrument and re-acquiring it from a holder in due course. Otherwise he would be able to take advantage of his own wrong in transferring the instrument. There are numerous cases, and so far as has been ascertained, no dissent from the position that the payee of an instrument which he has procured by fraud or upon an illegal consideration, cannot claim any rights under a re-acquirement of it from a holder in due course.³⁴

The same principle applies with equal force to a holder who is not the payee but took the instrument with notice or knowledge of the fraud or illegality. He has no right to recover upon the instrument; in fact, he is a constructive trustee for the defrauded party. If he transfers the instrument to a holder in due course, who could enforce it against the defrauded party, he is doing a wrong and it would be preposterous to permit him to take advantage of his own wrong by subsequently getting the instrument back from the holder in due course.

This proposition is supported by all the authorities directly in point which have been found.³⁵ It is the same principle which governs in like transfers of real estate.

"If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner who was charged with notice. If A., holding a title affected with notice, conveys to B., a *bonâ fide* purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also good faith." ³⁶

A recent case in the New York Appellate Division,³⁷ however, contains a *dictum* to the effect that only the payee of a note subject to the defense of fraud or illegality is debarred from sheltering

³⁴ 7 Cyc. 940, note 28, with many cases.

³⁵ *Dollarhide v. Hopkins*, 72 Ill. App. 509 (1897); *Feland v. Stirman*, 15 Ky. L. Rep. 271 (1893); *Cline v. Templeton*, 78 Ky. 550 (1880); *Coyne v. Anderson*, 73 S. W. 753 (Ky.), *semble*; *Devlin v. Brady*, 36 N. Y. 531 (1867).

³⁶ 2 Pomeroy, Equity Jurisprudence, sec. 754. See also *Trentman v. Eldridge*, 98 Ind. 525 (1884).

³⁷ *Horan v. Mason*, 141 N. Y. App. Div. 89, 125 N. Y. Supp. 668 (1910).

himself behind the rights of a holder in due course, from whom he had re-acquired it, after his previous transfer of it, but that a subsequent holder although taking with notice of the fraud or illegality could transfer the instrument, re-acquire it from a holder in due course and recover against parties prior to himself. The court cites in support of this proposition only two cases. In the first of these cases³⁸ the defense was not fraud or illegality but merely want of consideration, and in addition, the plaintiff had not been a holder of the instrument, and therefore could not be remitted to a position which he never had; and moreover knowledge of want of consideration is no defense whatever against one who paid value for the instrument.

In the other case relied upon by the Appellate Division³⁹ the plaintiff although an indorser, had never been a holder of the note and therefore was not in the position of having transferred a note which was subject to equities in his hands. Secondly, the defense was not fraud or illegality, but a counter-claim the nature of which did not appear. Finally, there was no claim that plaintiff had, at any time, notice or knowledge of the facts on which the counter-claim was based. It is submitted that neither of these cases supports the *dictum* in *Horan v. Mason*.

But the court in *Horan v. Mason* also construed section 58⁴⁰ of the Negotiable Instruments Law as not prohibiting a former holder with notice of fraud or illegality from recovering on the title of a holder in due course, from whom such former holder had re-acquired the instrument by paying it at maturity.

It is difficult to see why this construction of section 58 is not correct, since the plaintiff in the case supposed was not "himself a party to any fraud or illegality affecting the instrument." Possibly it might be argued that by transferring an instrument which he had taken with notice of a previous fraud or illegality which then affected it, he might thereby make himself a party to such fraud or illegality, but this is, to say the least, doubtful.

It may, however, be claimed that section 121⁴¹ of the Negotiable

³⁸ *Benedict v. De Groot*, 1 Abb. Dec. (N. Y.) 125 (1867).

³⁹ *Flint v. Schomberg*, 1 Hilton 532 (1858).

⁴⁰ N. Y. Consol. Laws, c. 38 (Laws of 1909, c. 43), § 97.

⁴¹ N. Y. Consol. Laws, c. 38 (Laws of 1909, c. 43), § 202. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may

Instruments Law is sufficient to prevent a purchaser with notice of fraud or illegality from bettering his position by a transfer to a holder in due course and a subsequent re-transfer to himself and that the *dictum* of the Appellate Division was due to its failure to consider section 121. A Massachusetts case ⁴² gives support to this view. It was there held that payment by an anomalous indorser extinguishes a note and that neither he nor his transferee can recover on the note because an anomalous indorser, although secondarily liable on the note, had no former rights on it against any party. His remedy against the maker whom he was backing would be outside the instrument.

There is this difference between the two cases. The anomalous indorser had never been a holder; he had never had title to the instrument and therefore could not have sued prior parties on it. In the case under discussion, the plaintiff had been a holder, he had held the title and therefore had had a legal right to sue prior parties, but he was subject to the equitable defense of fraud or illegality. But section 121 seems to cover both cases and to subject a party secondarily liable who pays the instrument to the same defenses which were good against him before his transfer, whether such defenses are legal or equitable.

There is, however, a case to which section 121 would clearly not apply. If the instrument is payable to bearer (whether originally so drawn or because indorsed in blank) and the holder transfers it by delivery, or if it is payable to his order and he indorses it without recourse and then subsequently re-acquires it from a holder in due course, he could recover on it even though when he first took the instrument he had notice of fraud or illegality affecting it. He does not come within section 121 and would not be remitted to his original position because he was not secondarily liable on the instrument.

And there is still another case in which section 121 does not cure the defect in section 58. Section 121 applies only when the instrument is *paid* by a party secondarily liable. If the instrument is re-

strike out his own and all subsequent indorsements, and again negotiate the instrument, except: 1. Where it is payable to the order of a third person, and has been paid by the drawer; and 2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

⁴² Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671 (1906).

acquired *before maturity*, it is not paid, and therefore section 121 would not prevent a party who took it with notice of fraud or illegality from acquiring a title free from such defenses by transferring the instrument to a holder in due course and taking a re-transfer before maturity. It is therefore necessary to amend section 58 to meet these two cases as well as to remove all doubt as to the other cases.

J. D. Brannan.

HARVARD LAW SCHOOL.

[*To be continued.*]

THE CONSTITUTION AND THE COURTS.¹

THE purpose of these pages is to offer certain comments and criticisms concerning current propositions for changing the manner by which laws may, or may not, be held unconstitutional by the courts, and in particular concerning the proposition popularly but inaccurately named the recall of judicial decisions; and finally to offer certain counter propositions concerning the same subject matter.

At the start I say frankly that the comments and criticisms are offered in a friendly spirit; for I feel convinced that there is much of truth in the reasons adduced to show the need of some change. I have, however, attempted to approach the subject with a view not only to the general public welfare but to the welfare and integrity of the courts, believing, as I do, that the two cannot well be kept separate.

There appear to have arisen in various parts of the country growing unrest and discontent with the judiciary, which have taken shape in a number of states, where judges are elected by popular vote, in proposals for the recall of judges by the same popular vote. The causes of this state of things are beyond the scope of this inquiry except in so far as they concern the power of the courts to hold laws unconstitutional; but there appears to be little doubt that decisions of courts, holding unconstitutional acts of the legislatures, have contributed to this discontent.

Many of these decisions have occurred in states blessed with constitutions which violate every first principle of what a constitution should be, and, instead of containing only a few fundamental principles, resemble more nearly volumes of general laws.² It is no wonder that the people of those states, after placing them-

¹ This paper was privately circulated in January of the current year, as bearing upon the political situation in New England, and with particular reference to Massachusetts. The references in the notes are taken mainly from United States and Massachusetts decisions, and are intended to be merely illustrative rather than compendious.

² Specific reference is omitted, not for lack of material, but because I have no desire to be unnecessarily invidious.

selves in legislative strait-jackets, are annoyed at the result. Their troubles, however, must be regarded as local, and will not here be further considered.

Decisions under those constitutions, however, are not the only ones which have caused trouble. There are few jurisdictions in which comment, or even agitation, has not been caused by the setting aside of some law desired by a considerable part of the community; and the cry is raised that the popular will has been frustrated, that the machinery for constitutional amendment is vexatious, cumbersome, and long; and that there is great difficulty in framing an apt amendment.

In the Spring of 1912 Colonel Roosevelt first proposed the so-called recall of decisions. That doctrine has since appeared and been developed in various forms, has been much misrepresented, and much abused. But it is a somewhat curious fact that in the East Colonel Roosevelt has been given little credit for his sagacity, all the more remarkable in a layman, in discerning that among the various reasons urged for the recall of judges, there existed a separate and distinct evil, reflecting not so much upon the judge as upon the body of the law itself, and requiring a remedy which should operate upon the law itself.

Before taking up the several forms of this particular remedy, I wish to emphasize the point that mere fault in one remedy does not excuse us from making an honest scientific attempt to find a better one. The part of many a public servant ends with pointing out an evil, and with indicating a desired result, which if reached will obviate the evil; and in such case the lawyer should assist to reach that result in rational forms of law, and should aid by a scientific analysis and suggestive, constructive treatment.³

I.

The first form in which I shall consider the proposed remedy is at once the simplest and the broadest, the form in which it

³ We should bear in mind that Colonel Roosevelt himself frankly disclaims any undue allegiance to the specific remedy in any particular form, and that the occasional approach to fanaticism on the subject has been mainly on the part of his lay disciples.

was most widely advocated on the stump, and in which it has been formally presented for legislative action in Colorado and Massachusetts.⁴

In that form the proposal is, briefly, that after any decision of the state court holding a state law invalid because in conflict with any provision of the state constitution, then, either upon petition by a certain number of voters or by resolve of the next general court, the act in question shall be referred to the people, and, if accepted by the people, shall thereafter have the force and effect of law.⁵

This sweeping proposition seems objectionable. In its application to certain broad provisions, such as the due process of law clause, its effect will be hereafter considered in connection with the second form in which the remedy is presented; but the present form is not limited in its effect, and must stand or fall according to its effect upon the constitution as a whole.

Many decisions under the constitution depend upon a pure matter of construction of specific constitutional provisions;⁶ and in pure matters of construction the courts exercise an essentially judicial function. When in such a case a clause has been judicially construed, the placing of a particular law outside of that construction tends to inequalities in the law repugnant to the fundamental theory of a government of laws, by which a particular principle of government should be capable of application to all classes of the community. The principle on which a new law is advocated should be statable in terms of a major premise, that is, in the form of a more or less general proposition, and, if it is not so statable, a strong presumption against the proposed law at once

⁴ In justice to those in charge of the measure presented to the Massachusetts legislature of 1913 (House Bill No. 1243) it should be stated that the measure was urged as tentative in form, and for the purpose of opening the question.

⁵ It should be borne in mind that in no form in which the proposed remedy has been advocated has it been suggested that the decision of a court in a particular case be reviewed or reversed by popular vote. It has merely been suggested that a decision against a law shall furnish a basis for a popular vote which shall have the effect, for the future, of confirming and validating the law.

⁶ For example, the decision of the Supreme Court of the United States that an income tax is a direct tax, *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601 (1895); and the decision of the Supreme Judicial Court of Massachusetts that a succession tax is an excise rather than a tax upon property. *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512 (1894).

arises. And if this presumption is overcome, it is perfectly possible under the present law to amend the constitution in a specific manner, so as expressly to permit a certain class of legislation.

The proposed method, moreover, very deftly evades placing itself upon either one of two horns of a dilemma. It is by no means clear whether a law when validated by popular vote becomes law outside of and *non obstante* the constitution, or whether the popular vote is regarded as a back-handed interpretation of the constitution.

If the former view is intended, then an anomalous body of laws will grow up, which are neither fish nor flesh, neither mere law nor yet a part of the constitution; and embarrassing questions will arise as to how far such laws may be added to or amended by mere legislative authority. Under this view, moreover, the constitution becomes a mere temporary check upon hasty legislation, like the House of Lords in England. Checks for delay may be a perfectly proper means of accomplishing a quasi-constitutional safeguard, but a written constitution based on reason and containing principles regarded as fundamental truth cannot be so used. Truth of this nature does not change by lapse of time; and a constitutional safeguard, phrased in terms of reason, should be removed, if at all, in terms of reason.

If the latter view is intended, that the people have interpreted the constitution, the obvious answer is that they have done no such thing. They have voted for the law; they cannot be fairly supposed to have reviewed the reasoning, often highly technical and historical, by which the court reached its decision. And if their vote be regarded as an interpretation, it will stand as a precedent for future decisions; and future courts will be placed in the impossible position of having to consider and apply a precedent, inconsistent with other precedents, for which no reasons are furnished, and for which the courts must grope backward in the dark in a blind search for possible premises.

These difficulties hardly comport with the maintenance of an orderly system and rational body of law, which may be of as great public importance as the immediate accomplishment of a particular desirable legislative result.

II.

The second form in which the proposed remedy is presented is that advocated by Colonel Roosevelt in his speech at Carnegie Hall, and expounded and developed by Mr. William L. Ransom of the New York bar.⁷

"I am proposing merely that in a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the legislature for the general welfare, the question of the validity of the law — which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion — be submitted for final determination to a vote of the people, taken after due time for consideration. And I contend that the people, in the nature of things, must be better judges of what is the preponderant opinion than the courts, and that the courts should not be allowed to reverse the political philosophy of the people."⁸

Before considering the remedy presented in this form, it is important to analyze, so far as it is capable of analysis, the judicial function in its various aspects, first, as exercised in the ordinary case, and second, as exercised and developed with reference to constitutional questions.

The judicial function in England was long almost indistinguishable from the legislative function; and even after courts had assumed a fairly definite judicial character, both functions continued to be exercised without conscious distinction by the Parliament or the Council.⁹ By the time of the American Revolution a substantial separation of these functions had been accomplished, but this separation was, at best, only approximate.¹⁰

In American constitutions an attempt was made to follow the dogma made current by Montesquieu in his *Esprit des Lois* by effecting a complete separation of powers;¹¹ and while such a

⁷ Ransom, *Majority Rule and the Judiciary*.

⁸ *Id.*, p. 114.

⁹ McIlwain, *The High Court of Parliament and its Supremacy*, especially chapters 3 and 4; Pollock, *First Book of Jurisprudence*, 348-349; Maitland, *Constitutional History*, 20, 105, 136, 218; Gneist, *English Parliament* (Shee's translation), 16, 17, 116-122; Hale, *Jurisdiction of the Lord's House* (Hargrave's ed. 1796), 4, 26, 32, 38, 68, 84-86, 103.

¹⁰ The House of Lords is still the highest Court of Appeal.

¹¹ Montesquieu, *De l'Esprit des Lois*, Geneva, 1749, 242-244; McIlwain, 322, 323.

separation was in the main accomplished, it has always been recognized that it has been in some respects inexact.¹²

In its simplest form, the judicial function consists in declaring the law and applying it to the facts.¹³ Facts, in the main, are settled by the jury. Certain other facts are determined by the court, as in construing statutes or deciding on admissibility of evidence; and in certain cases, such as equity cases, the court takes the place of the jury as a tribunal of fact. But in the main the distinction between law and fact is preserved.¹⁴

In declaring the law, two kinds of law are encountered, the common law and the statute law.

The common law is unwritten. In declaring or extending the common law the court theoretically acts only upon principles already established, while the legislature may adopt new principles; and yet when the court develops or extends the common law the line between judicial and legislative action becomes almost indistinguishable.¹⁵

In the construction of statutes, often the matter resolves itself into the purely technical construction of a document. On the other hand, facts bearing upon the probable intent of the legislature are often considered,¹⁶ and in such cases again the line between judicial and legislative action becomes blurred.

In all of these cases, erroneous decisions of the facts at issue between the parties bear only on the individual litigants, and erroneous declarations of the common or statute law, — even where the court has in effect invaded the province of the legislature — may be readily corrected by another legislature.

With the advent of the American constitutions, there was added to the judicial function a high prerogative involving new and unprecedented responsibilities, — the power of the court to disregard

¹² Dicey, *Law of the Constitution*, Chapter XII; *The Federalist*, No. 47. See Pound, *Legislation as a Social Function*, which, by courtesy of the author, I have consulted in manuscript, and which is to appear in the *American Journal of Sociology*.

¹³ Thayer, *Preliminary Treatise on Evidence*, 183.

¹⁴ *Id.*, Chapter V.

¹⁵ *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227 (1908); *Holmes, Common Law*, 35, 36.

¹⁶ Thayer, *Preliminary Treatise*, 216.

acts of the legislature, a coördinate member of the body politic, for violation of the fundamental law.¹⁷

It is foreign to my present purpose to enter upon the pros and cons of the question now being so fully discussed, whether it was originally rightly decided that the courts have this power. Adequate discussion on both sides is elsewhere available;¹⁸ although, of course, much that is being said by those cheerful optimists, mostly laymen, who airily assume that Chief Justice Marshall,¹⁹ Chief Justice Shaw²⁰ and the other great judges could not rationally have held the opinions which they announced in favor of this power in the courts, is negligible in any serious discussion. I myself hold that the question was rightly decided; but I maintain on the other hand that there is much to be said on either side,²¹ and that in any event the exercise of this high prerogative is not necessarily a judicial function; and I regard with little sympathy the views of those legal formalists who insist that any change, even a partial one, would necessarily be fatal to our existence as a free country. I hold that it is better that the constitution should bend, if thereby its substance may be retained, rather than break under too great a strain.

The position of the courts, moreover, in dealing with constitutional questions differs from that of the typical judicial body not only with respect to their high prerogative of disregarding acts of a legislative body, but with respect to matters of detail in the exercise of that prerogative.

Upon pure questions of technical construction, it is true, their functions differ but slightly from the ordinary judicial function of construing a deed, will or other document. But the more fundamen-

¹⁷ Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 130.

¹⁸ *Marbury v. Madison*, 1 Cranch (U. S.) 137 (1803); *Eakin v. Raub*, 12 S. & R. (Pa.) 330 (1825), and especially the able dissenting opinion of Mr. Justice Gibson; *Norwich v. County Commissioners of Hampshire*, 13 Pick. (Mass.) 60 (1833). See Coxe, *Judicial Power and Unconstitutional Legislation*, 219-271; Beard, *The Supreme Court and The Constitution*; McLaughlin, *The Courts, The Constitution and Parties*; Dougherty, *Power of Federal Judiciary over Legislation*.

¹⁹ *Marbury v. Madison*, 1 Cranch (U. S.) 137 (1803).

²⁰ *Norwich v. County Commissioners of Hampshire*, 13 Pick. (Mass.) 60 (1833).

²¹ Coxe, *Judicial Power and Unconstitutional Legislation*, 270, 271; Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 130.

tal questions are not simple questions of construction. The guaranties of fundamental rights are phrased in broad general terms, and their application in a given case often depends not only upon the facts proved as between the parties to the litigation but upon the facts and conditions of social, economic and political import, while the very breadth of the provisions in question leads more readily to decisions in that borderland where the boundary between the judicial and the legislative is lost in shadow.

The consequences of error, also, are vastly more serious. If a court errs with respect to a statute, or unduly extends the common law, only the individual litigant is harmed, and it is a simple step for the legislature to mend the matter. If on the other hand the court errs in its interpretation of the constitution, only the cumbersome process of amendment can cure the wrong, and in the meantime the entire commonwealth is harmed. Decisions upon constitutional questions have a dual significance. They not only settle the particular controversy between the parties, but also as a practical matter settle the status, as to validity, of the law in question for the whole state and for all time. Although this second aspect of decisions is now left to inference, it is seldom in practice questioned.²²

I propose now to analyze with a little further particularity the workings of the judicial functions as developed in the United States with respect to the more fundamental constitutional questions. I shall take as my main thesis the judicial treatment of that broad general limitation upon legislative authority which in some form is common to most of the state constitutions, — the provision that no one may be deprived of life, liberty, or property without due process of law.²³ And I wish to make it clear that my primary concern is with state courts and state constitutions. While the most instructive statements of the law are often to be derived

²² The possibility that an act, when once held unconstitutional, may not be invalid for all time and under all circumstances, is not very often taken into account. For an interesting exception to this general attitude, see *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737, 749 (1900).

²³ See Constitution of Massachusetts, Part I, Articles X and XII; Part II, Chapter 1, Section 1, Article IV.

from the federal decisions, I am not now directly concerned with the rather peculiar position of the Supreme Court of the United States, which, in dealing with acts of Congress, is dealing with a body possessing only limited powers, and, in dealing with the legislatures of the states touching the Constitution of the United States, is exercising a paramount authority of supervision, and, if necessary, of censorship. My present concern is with the case of a single state or sovereignty, having a written constitution of its own, and co-ordinate legislative and judicial departments.

The development of the attitude of the courts toward questions of what is due process of law,²⁴ and the gradual change in the manner in which such questions are presented, have been to a high degree significant.

The first impulse of the judges was to treat such and indeed all other constitutional questions as pure questions of strict construction of two written instruments, one a constitution, and the other a statute; and where the latter conflicted with the former it had to give way. This view ignored the fact already referred to that in the exercise of a power of such magnitude and of such public significance, the court was acting, though judicially in form, yet in substance as a part of the political system, and determining questions which were in reality political and governmental. Chief Justice Marshall early recognized this situation, and pointed out that courts must remember that "it is a constitution we are expounding."²⁵ And gradually, though by halting steps, it became recognized as an administrative rule, that the courts should not assume to review the wisdom of legislative action, or pass upon the facts which actuated such action; and that the action of the legislature should be supported unless it clearly and unmistakably exceeded the limitations of the constitution.²⁶ A more consistent adherence to this rule would doubtless have done much to prevent the current agitation.

In dealing with the question of due process of law, the courts

²⁴ That question first arose only in the state courts, although under the Fifth Amendment the federal courts occasionally had the same question to decide with respect to acts of Congress. With the adoption of the Fourteenth Amendment after the Civil War began the long line of decisions on the subject in the federal courts.

²⁵ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 407 (1819).

²⁶ Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 130.

early recognized that due process was not necessarily confined to judicial process, but might consist of any of the recognized forms of legislative action.²⁷ The cases considering the question whether legislative action is or is not due process of law, I shall not be audacious or didactic enough to attempt to classify in an exhaustive manner, but the following generalizations will be found to be roughly true.

Many of the cases find a touchstone, with which to solve all difficulties, in the phrase "the police power." Whatever is an exercise of the police power is due process of law. Discussions and attempted definitions of the phrase, however, are unsatisfactory, because of its loose use in a variety of different connections.²⁸ As used in connection with due process of law, it is either a question-begging phrase synonymous with that broad general power of a legislature to establish all manner of laws for the general good within some vague and undefined limit,²⁹ or else a "conciliatory"³⁰ phrase used to cover up some slight apparent overstepping of the boundaries fixed by that limit.

What that limit was long remained undefined. The earlier cases deal in the main with historical investigation into the commonly accepted objects of legislation; and if it were found that the object, and also the fashion and manner of legislation, had the sanction of usage, that generally settled the question.³¹ Little attention was paid to the reasonableness of the legislation in question, although many expressions may doubtless be found in which the reasonableness of a law, which is held valid, is pointed out.

²⁷ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 281 (1855); *Burnham v. Webster*, 5 Mass. 265 (1809); *Vinton v. Welsh*, 9 Pick. (Mass.) 87 (1829); *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 85 (1851).

²⁸ Thayer, *Cases on Constitutional Law*, 693, note, 742, note.

²⁹ *Mugler v. Kansas*, 123 U. S. 623 (1887); *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140 (1854); *Commonwealth v. Alger*, 7 Cush. (Mass.) 53, 85 (1851).

³⁰ I borrow the familiar comment of Mr. Justice Holmes. See *Lawton v. Steele*, 152 U. S. 133 (1894); *Danforth v. Groton Water Co.*, 178 Mass. 472, 476, 477, 59 N. E. 1033 (1901); *Dunbar v. Boston & Providence R. Co.*, 181 Mass. 383, 63 N. E. 916 (1902).

³¹ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 281 (1855); *Commonwealth v. Bailey*, 13 Allen (Mass.) 541 (1866); *Commonwealth v. Alger*, 7 Cush. (Mass.) 53 (1851); *Commonwealth v. Blackington*, 24 Pick. (Mass.) 352 (1837); *Commonwealth v. Badlam*, 9 Pick. (Mass.) 362 (1830); *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9 (1885).

Gradually the voice from the past became fainter in answer to these questions, and it became necessary to consider objects of legislation not so much from the point of view of justification by usage, as from the point of view of justification by the public importance of the object.³²

In like manner the fashion and manner of legislation underwent a change. New and unprecedented forms of legislation appeared, in which justification by usage became increasingly difficult. At first it was deemed a somewhat radical concession to hold that these new fashions might be employed provided they "regard and preserve the principles of liberty and justice."³³ In attempting to define the limits much loose phraseology may be found which in reality begs the question;³⁴ but, in general, the test has now been firmly established, that such legislation must not be "absolute and despotic," must not be *arbitrary*.³⁵

The decisions of the future, therefore, upon questions of due process of law will resolve themselves under three heads:

1. Is the act for a public purpose or object?
2. Is it adapted to the purpose?
3. If the act is for a public purpose, and is adapted to the purpose, is it arbitrary in its effect upon persons and property?

The real significance of this gradual change, from the public and political standpoint, lies in the fact that, while in the past questions of this general character have been decided largely upon history, usage, precedent, and authority, — a proceeding well calculated to be properly dealt with by the judicial temper, and not differing widely from the strictly judicial questions — now these questions must be more and more decided by passing in review the same public and political questions with which the legislature itself has dealt;³⁶ and the cases must often be decided upon in-

³² *Budd v. New York*, 143 U. S. 517 (1892).

³³ *Hurtado v. California*, 110 U. S. 516, 535, 536 (1884).

³⁴ *Booth v. Illinois*, 184 U. S. 425, 429 (1902); *Lochner v. New York*, 198 U. S. 45 (1905).

³⁵ This is true at least of the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts. *Noble State Bank v. Haskell*, 219 U. S. 104, 111 (1911); *Twining v. New Jersey*, 211 U. S. 78, 100, 101 (1908); *J. P. Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312 (1904); *Commonwealth v. Pear*, 183 Mass. 242, 247, 248, 66 N. E. 719, 721, 722 (1903); *Opinion of the Justices*, 163 Mass. 589, 40 N. E. 713 (1895).

³⁶ See *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227 (1908).

sufficient premises, and without adequate machinery for determining the public facts. And by "public facts" I mean those facts in which the public is interested, from which the legislature must have drawn the inference that the law in question would subserve the general welfare of the community, — facts most of which are not now even admissible in evidence before the court,³⁷ and must be considered, if at all, by being judicially noticed.³⁸

Yet it is with respect to decisions of this class, dealing with the three questions enumerated above, that the most serious criticism has arisen. The cases most often cited, — cases in which state laws have been held invalid limiting the hours of labor of women in factories,³⁹ limiting the hours of labor of employees in bakeries,⁴⁰ forbidding the manufacture of cigars in tenement houses,⁴¹ or establishing a system of compensation at fixed rates for employees injured in the course of their employment,⁴² — hold that the law in question either did not serve a permissible public purpose or was arbitrary in its effect upon personal liberty or property.⁴³ And it is with respect to this class of cases that the proposed remedy is urged.

³⁷ *Jacobson v. Massachusetts*, 197 U. S. 11, 30, 36 (1905); *Commonwealth v. Sisson*, 189 Mass. 247, 252, 75 N. E. 619, 621 (1905); *Commonwealth v. Pear*, 183 Mass. 242; 246, 247, 66 N. E. 719, 721 (1903).

³⁸ Thayer, *Preliminary Treatise*, 301, 304; Pound, *Liberty of Contract*, Yale Law Journal, May, 1909.

³⁹ *People v. Williams*, 189 N. Y. 131, 81 N. E. 778 (1907).

⁴⁰ *Lochner v. New York*, 198 U. S. 45 (1905).

⁴¹ *Matter of Jacobs*, 98 N. Y. 98 (1885).

⁴² *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911).

⁴³ It seems probable in the foregoing cases that while the Supreme Court of the United States merely failed to apply the modern definition of due process of law, the New York Court of Appeals has not fully accepted it. Where this is so, courts will have to be furnished with a new definition by constitutional amendment.

Instances of comparatively recent Massachusetts cases falling within the general class of decisions referred to in the text, in which laws have been held unconstitutional, are the following: *Durgin v. Minot*, 203 Mass. 26, 89 N. E. 144 (1909); *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 86 N. E. 925 (1909); *O'Keeffe v. Somerville*, 190 Mass. 110, 76 N. E. 457 (1906); *Attorney-General v. Boston & Albany R. Co.*, 160 Mass. 62, 35 N. E. 252 (1893); *Opinions of the Justices*, 211 Mass. 618, 98 N. E. 337 (1912); 208 Mass. 607, 94 N. E. 848 (1911); 208 Mass. 619, 623, 94 N. E. 1044 (1911) *semble*; 207 Mass. 601, 94 N. E. 558 (1911). There are very few instances in which this court has blocked industrial legislation. See *Opinion of the Justices*, 209 Mass. 607, 96 N. E. 308 (1911); *Mutual Loan Co. v. Martell*, 200 Mass. 482, 86 N. E. 916 (1909); *Commonwealth v. Interstate Consolidated Street Ry. Co.*, 187 Mass. 436, 73 N. E. 530 (1905); *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876).

Taking up these classes of decisions in order of the three subdivisions above noted, we find that the first, decisions that the purpose is not a recognized public purpose, turn upon a pure question of fact, a fact of high political and public import, to be sure, but none the less a fact. And this fact, when decided, has place as a part of the body of constitutional law no more necessarily than has the verdict of a jury in the ordinary case.

The second class of decisions, that the act of the legislature is not adapted to the ostensible purpose, finds few instances in the reports of the more enlightened of our state courts. Such decisions may have a place in the courts of the United States, which are charged with the added burden of seeing to it that state legislatures do not evade the federal Constitution; but as between the coördinate judicial and legislative departments of a single sovereign state, the courts very properly decline to impugn the motives, or, to this extent, to doubt the intelligence of the legislature, when the legislature deems a means in some measure adapted to an end.

The third class of decisions, in which courts assume to set aside acts of the legislature on the ground that in their effect upon individual rights they are arbitrary, turn upon mixed public and private facts, — public facts so far as the public welfare is concerned, private facts so far as the effect upon the individual is concerned.

The public facts are often matters of inference. The question for the court is often stated to be, whether a state of public facts could possibly exist which would warrant the action of the legislature.⁴⁴ But the question as to the possible existence of facts involves of necessity a familiarity with, and an inquiry into, actual facts and conditions;⁴⁵ and, finally, the ultimate decision depends upon the weighing of these two sets of facts, one against the other — on the one hand the private facts which have been brought to light, and, on the other hand, all the actual or potential public facts ⁴⁶ — and upon the determination whether the legislature, weighing all the facts, could within the bounds of reason have reached the deliberate judgment that individual interest should be sacrificed to the public welfare to the extent required by the act in question.

⁴⁴ *Munn v. Illinois*, 94 U. S. 113, 132 (1876).

⁴⁵ *Commonwealth v. Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 440, 73 N. E. 530, 532 (1905).

⁴⁶ *Mutual Loan Co. v. Martell*, 200 Mass. 482, 484, 86 N. E. 916, 917 (1909).

This final decision, as is recognized by the more acute and intellectually honest of the judges, is largely a question of degree,⁴⁷ a question of how far individual harm could be inflicted for the particular public benefit without being deemed arbitrary; and this question, although complex, is a question of fact.

An error on the part of the court in any one of the foregoing classes of decisions is clearly an error in matter of fact. If it affected merely one individual we might well say, let him grin and bear it, as in the case of an erroneous verdict of a jury. But the practical effect, as has been said, harms the entire commonwealth.

The only remedy at present afforded is by constitutional amendment. Yet the trouble is not with any provision of the constitution, but rather with the determination of the facts and conclusions of fact to which the provisions of the constitution are applied. And under guise of law, there have crept into the law reports pages and pages of what is in reality mere discussion and determination of facts by the court, which strictly do not belong in the body of the law at all.⁴⁸ Yet these decisions of fact, often based upon matters which the court has felt obliged to find out about as best it could under the doctrine of judicial notice — a doctrine very useful at common law, but never meant to stand so great a strain — are treated as if they formed a part of the law of the land, and are regarded as binding authority for subsequent similar decisions. And the worst of it is that these decisions of fact are to a great extent based upon a very vigorous, individualistic view of the philosophy of government, in which the emphasis as between private rights and the public welfare does not accord with the emphasis of the present day. Under these circumstances, greater facility in the method of amending the constitution would avail nothing. The fact that no way exists by which the misapplication of a broad general provision of the constitution to the facts may be corrected, except by amendment of the provision itself, is a grave defect in our system of constitutional law.

Granted the existence of a defect, however, the question of the remedy is fraught with difficulty. To the historian who considers the well-nigh extraordinary, even though sometimes illogical, man-

⁴⁷ *Martin v. District of Columbia*, 205 U. S. 135, 139 (1907).

⁴⁸ See Thayer, *Preliminary Treatise*, 215, 247; Pound, *Liberty of Contract*, *Yale Law Journal*, May, 1909; *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227 (1908).

ner with which Anglo-Saxon institutions have in the long run adapted themselves to changing conditions, to the philosopher, in whose eyes time is at best merely relative, there are strong grounds for the hope that relief will come through the inevitable, even if slow, response of the courts to public opinion. This response is certain in the end; it is only in times of stress and of rapidly changing public opinion that the response for the moment seems to be laggard.

A defect in existing machinery may be of a nature such as to become apparent only in times of stress, when the machinery is under high pressure, and perhaps is overtaxed. And we should do well to pause before we add a new piece of mechanism, until we are certain that it is necessary, and until we are certain that the new mechanism will not in a manner unforeseen throw out of adjustment the old machinery in respects in which it is working well.

We must not forget, too, that, in times past, the courts and the constitution have often safeguarded human rights against oppression. We must not forget that, in the present, the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts, at all events, have, with few exceptions, taken an enlightened position with regard to the broad scope of the legislative authority, and that the liberal spirit in those courts and in others is, on the whole, increasing.

Yet it may well be true that the time has come in which the defect which has been pointed out must be remedied, and, if so, it is important to choose the remedy with circumspection.

We may now consider Colonel Roosevelt's suggestion, already quoted, as presented in the second form.

The first obvious comment is that it does not touch, or purport to touch, court decisions in their first aspect, as settling the particular controversy between the parties. Doubtless in this aspect the interest of the public is less directly affected; but if there is a defect in the present system, and the defect can be cured, the individual litigants should share in the cure, and the courts should, as far as possible, be protected from being placed in the position of having a decision, which in its private aspect is final, shown to be erroneous by being corrected in its public aspect.

We now turn to the proposed remedy as applied to decisions in their public aspect, and in particular to the subdivisions of decisions under the due process of law clause as analyzed above.

As applied to the first of the three classes of decisions, I see little theoretical objection to the plan and much to commend it. The question whether, for instance, legislation in aid of the rebuilding of Boston after the great fire,⁴⁹ or legislation permitting the establishment of municipal fuel yards,⁵⁰ was for a public purpose, was a pure question of public fact which might well have been determined by the ballots of all the voters of the commonwealth.

The serious practical objection to the plan is that many people not only fail to understand it, but interpret it as meaning something else and something gravely objectionable. It is no reproach to the average voter to say that he is not familiar with nice technical distinctions in the details of government, and he is in real danger of being allowed to suppose that the plan involves the submission to popular vote of the decision by the court of the particular case. It is all very well to argue to a lawyer that only the future status of the law in question is involved, that the people are to deal only with the second aspect of the case which now is determined by the court only by inference, and that in substance the proposed plan is merely to limit the power of the court in this class of cases to a power to suspend until the people can vote. A layman who fails to grasp these distinctions is not necessarily either stupid or uneducated. Even if the plan were rephrased, and it should be urged that in the class of cases depending merely upon public fact the power of the courts should be limited to the power to suspend a law until further legislative action, it would be difficult to explain why this does not amount to subjecting the courts to reversal, or why their decisions should be final in one class of cases and not in another. The practical danger lies in what the plan suggests, and in what it is too often supposed to mean.

With respect to that class of cases in which acts of the legislature are set aside on the ground that in their effect upon individual rights they are arbitrary, there seem to be still further objections to the plan proposed, which require consideration.

Up to a certain point, undoubtedly, reason supports the proposed

⁴⁹ *Lowell v. Boston*, 111 Mass. 454 (1873).

⁵⁰ *Opinion of the Justices*, 182 Mass. 605 (1903).

remedy. This class of cases is the one which causes the gravest disquiet to the student of law and government from the point of view not only of the common weal but of the integrity and dignity of the court itself. The function performed by the courts in this class of cases has been already described; but there are grounds for the belief that they impose burdens upon the courts too grievous to be borne. I do not mean to say that these functions are not proper judicial functions. They are, in fact, essentially similar to functions every day performed by courts in the construction of statutes.⁵¹ The consequences, however, are so vast and the public and political import so overwhelming, that it may well be wiser to place the responsibility of decision either upon the people or at least upon a more responsive and more directly accountable political body.

Have we not, in short, reached the breaking point in the power of the courts to gainsay the legislatures? When an essentially modern question is before them, with no aid from historic usage and authority, when they are called upon to determine whether in the light of all the facts, private and public, social and economic, facts which are within the peculiar knowledge of the legislature, and of which the courts have only limited sources of information, is it fair that they should be expected to decide that ultimate question of degree which lies between the rational and the arbitrary in legislative action?

In dealing with new and unprecedented social and economic

⁵¹ Even in the construction of statutes, courts have occasionally recognized their difficulties, and we find instances in which they have taken advisory opinions from juries in matters of fact. Thayer, Preliminary Treatise, 215, 216, 259-262; *Commonwealth v. Wright*, 137 Mass. 250 (1884); *Commonwealth v. Sullivan*, 146 Mass. 142, 145, 15 N. E. 491, 494 (1888). And in cases under the constitution there are instances in which courts have taken advisory opinions of the jury. *Postal Telegraph & Cable Co. v. New Hope*, 192 U. S. 55 (1904); 202 Pa. St. 532, 52 Atl. 127 (1902).

Compare also the doctrine held in some jurisdictions that the question whether an act of the legislature has been enacted in accordance with constitutional requirements is a question of fact to be determined upon all the evidence. *State v. M and*, 18 Neb. 236, 25 N. W. 77 (1885); *Webster v. Hastings*, 56 Neb. 669, 673, 675, 77 N. W. 127, 129 (1898).

Compare also the willingness of the Supreme Court of the United States to treat the question of the reasonableness of the rentals charged by a city for the locations of interstate telegraph poles as a question of fact for the jury. *Atlantic & Pacific Telegraph Co. v. Philadelphia*, 190 U. S. 160 (1903).

questions and current opinions, moreover, it is only human for an honest and upright but conservative thinker to see nothing but danger and despotism in the manner of thought of, and the measures advocated by, his more liberal neighbor, and it requires on the part of a judge the highest degree of analytic acumen and intellectual honesty to concede to others that latitude of opinion within the bounds of the rational which is absolutely necessary before he can rightly decide the highly artificial question which he is now compelled to decide.

It is not every judge who can not only believe but live up to the following creed:

"A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state, or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."⁶²

Firmly as I believe in the importance of the judges maintaining a sympathetic attitude towards predominant public opinion, I do not believe in subjecting an honest and upright judge to undue attack merely because he happens to be by temperament either a conservative or a liberal. He should be criticized fully, fairly, and freely if his reasoning does not commend itself, but he should be protected from ill-considered abuse merely because the result of his decision is unpopular, — a practice no better than any other form of the time-honored and unsportsmanlike game of throwing bricks at the umpire, — and should be relieved of burdens which bear upon him with undue severity. For, after all, the weight, authority, and good name of the courts throughout the community are among the most important safeguards of human rights in any civilized state.

In the class of cases now under consideration, where the question turns upon the decision whether the legislature has acted within the bounds of reason, what can written safeguards do beyond insuring to the persons aggrieved an opportunity to present the ex-

⁶² Dissenting opinion of Mr. Justice Holmes in *Lochner v. New York*, 198 U. S. 45, 75, 76 (1905).

tent of their injuries as shown by actual experience in an orderly and complete fashion, and then, when opportunity for due deliberation and sober judgment has been afforded, placing the responsibility for the final decision of that ultimate question of degree upon the legislative department?

All that can be required under these circumstances finally to establish a law is another confirmatory act of the legislative authority. And this, as I understand it, is what will be accomplished by the popular vote held under the plan proposed; the people, after the fashion of direct legislation, will pronounce the final legislative fiat.

At this point, however, I doubt the wisdom of this immediate vote of the people. The question is merely a question of direct legislation. The final fiat, although legislative, will be of a highly deliberative character, quite different from the determination of one simple fact. The essence of the constitutional guaranty is a full and fair consideration of the case of the individuals aggrieved before a deliberative body, and a careful weighing of the private facts against the public facts before final action. Even if a popular vote is ultimately to be had, I doubt if the proceedings before a court of justice are of a popular character such as to prepare the public mind for an immediate direct vote; and there would be grave danger that the case would go before the people upon the public facts without sufficient consideration of the private facts. Nor do I think it healthy either for the courts or for the community that a judicial inquiry should be used for this preliminary legislative purpose.

III.

As an alternative remedy, I wish tentatively to suggest the following, which in some respects may be less open to objection than the other, but which nevertheless may prove equally effective in curing the evils which have been pointed out.

Let there be established ⁵³ a tribunal composed of experts trained in matters of government and sociology, which shall perform for the courts a service analogous to that performed for the legislature

⁵³ By constitutional amendment, if necessary.

of Wisconsin by Dr. McCarthy's legislative bureau,⁵⁴ but which shall have in addition certain mixed functions, in part judicial and in part legislative.⁵⁵

To this new body the courts may refer the question whether an act passed by the legislature for a proper purpose is arbitrary in its effect upon individual rights. Not only the individual, but all other persons interested, may present evidence and be heard, the attorney-general shall represent the commonwealth, and the tribunal may consider all manner of evidence and make further investigation on its own initiative.

The decision of the new body, certified to the court, will furnish the basis of decision for the particular case, and, if against the law, will suspend it for a certain length of time, or in any event until further action by the legislature.

The new body will also be required to report its findings to the legislature, together with any recommendations which it may see fit to make; and, if any act reported to be arbitrary shall thereafter be reaffirmed without change by the legislative authority, it shall take effect as law.

To this same tribunal I suggest referring, as to a jury, the public fact in the first class of cases above referred to, whether an act passed by the legislature is for a public purpose; and the tribunal will in like manner report to the court, as a basis for the decision of the particular case, and to the legislature.

The tribunal thus created, as has been already intimated, would act in a dual capacity.

In its quasi-judicial capacity it would aid the courts in the decision of the particular case in its first aspect, — that of settling

⁵⁴ See Jones, *Statute Law Making*, 20-25; Report of Librarian of Congress, April, 1911, *Legislative Reference Bureaus*; Pound, *Legislation as a Social Function*, above referred to, and to appear in the *American Journal of Sociology*.

Professor Pound also points out, in *Scope and Purposes of Sociological Jurisprudence*, 25 *HARV. L. REV.* 514, the particular importance of studying laws in "their social operation, and the effects which they produce, if any, when put in action."

Compare also the administrative department of the Municipal Court of Chicago, and the suggestions made in the Fifth Report of that court.

⁵⁵ How this body shall be elected or appointed, whether it shall be a permanent board, or appointed, as a jury is empanelled, for each particular case, and whether, if a permanent board, it would have work enough to do to occupy its time unless consolidated with a body having other functions, such as a legislative reference bureau, are questions of detail with which I do not here attempt to deal.

the controversy between the parties. It would do so by weighing the public facts and conclusions of fact necessary to the decision; it would be, in effect, a tribunal of public facts.

In its quasi-legislative capacity it would aid in the decision of the case in its second aspect, — that of determining the status, as to validity, of the law in question in its future effect upon the whole public, and the effect of the decision in this second aspect would no longer be left to inference. A finding that a law was arbitrary, or did not serve a public purpose, would of itself suspend the operation of the law; and at the same time the tribunal would be in a position to recommend to the legislature further legislation on the same subject.

Whether by this road the act is ultimately referred to the people will be a simple question of direct legislation, and will depend upon the general law in force in the state in question in regard to initiative and referendum.⁵⁶ In whatever form, however, the final legislative action takes place, the measure will first have been presented and debated before a body of experts, and the facts will have been investigated in an authentic manner. In this class of cases, where legislation of so important a nature is to take place, the utmost precaution should be taken. Legislative action, whether direct or delegated, requires aids to facts no less than do the courts, and the complexities of modern legislation are often inadequately dealt with even by representative bodies, because of inadequate consideration and analysis of the facts. Still more necessary, with

⁵⁶ Nothing in the present proposition is in any respect inconsistent with obtaining a popular vote as speedily as under Colonel Roosevelt's proposition. While the responsibility for certain matters heretofore entrusted to the courts is shifted to a new body, the decisions of that body will serve as readily as preliminaries to a popular vote as would the decisions by the courts. So far as the present proposition relates to the future status of the law in question, its main object, after shifting the burden of certain decisions to a differently constituted tribunal, is, in case of a decision adverse to a particular law, to suspend the law until there has been another fiat on the part of the legislative authority of the state. The further question whether that fiat shall take the form of an act of the legislature or a vote of the people should depend, not upon some provision peculiar to the subject now under discussion, except perhaps in the case of peculiarly malignant local symptoms such as appear to exist in the state of New York, but upon the general law of the state in question with respect to initiative and referendum; and if the law of the state permits the initiative and referendum, the subsidiary question, whether decisions of the new body should first be reported to the legislature, or whether they may serve as a basis for an immediate popular vote, would be a matter to be solved by local experts on direct legislation.

the growth of modern direct legislation, must be improved provision for the presentation, consideration, and publication of the facts.

By this method, it is believed, findings of fact will be placed beyond question in their proper position with relation to the law itself. The findings of fact by the new tribunal, whether public or private, will be in no sense parts of the constitution, but merely records of the material facts relating to the law in question, and authoritative, as bearing upon future similar questions, only as a reliable scientific work is authoritative.

Three other important points will be gained. The courts will be relieved of the position, ignominious at least in appearance, of having their judicial mandates converted into mere temporary checks upon hasty legislative action, or subjected to popular review and reversal. The tribunal of public facts will be a body of a political nature, closely connected with and accountable to the legislative department. And finally, the courts will be relieved of the opprobrium attending the decision of essentially political questions in which popular feeling often runs high, much as they are now relieved by the jury of the burden of deciding the guilt or innocence of a human being accused of murder.

Whether this method would be a final solution of the present difficulties cannot be foretold. Doubtless there are other general constitutional provisions involving the determination of public facts which also might well be referred to the new tribunal.⁵⁷ All that is claimed for this suggestion is that it furnishes a possible remedy for the evils in the body politic which now appear to be malignant.⁵⁸

⁵⁷ Notably questions of eminent domain and taxation, as to whether the purpose is a public one; and questions of the equal protection of laws, as to whether or not an arbitrary classification has been made.

⁵⁸ Upon the remedy suggested in the text the changes may be rung almost *ad infinitum*.

A tribunal of fact might be provided merely for the particular case. But the dual aspect of the decision, as validating or invalidating the law itself, can hardly be avoided, and it seems better to recognize it frankly.

It might be provided that the new tribunal should determine the facts merely for the particular law in question, and that the facts so determined should have their proper place merely as findings of fact, like the verdict of a jury, and should not affect the validity of subsequent laws, either in the same or in some other form. But in that case a law in the same form might have to be reexamined and perhaps again

It must be remembered, moreover, that the Fourteenth Amendment to the Constitution of the United States contains substantially the same due process of law provision, which must still be finally passed upon by the Supreme Court of the United States.

The proposed method will merely serve to prevent the state courts from attaching some peculiar significance to the phrasing of the state constitution, and thus leaving no federal question in the case.

Under the United States Constitution a decision by the state court upholding a law, upon certificate by the new tribunal, would probably be held to be due process of law, although the decision of that body upon the questions referred to it would have to be capable of review by the Supreme Court of the United States, if the federal Constitution were involved, and for this purpose its proceedings should be given a quasi-judicial character. The Supreme Court of the United States has said:

"We know of no provision in the federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process."⁵⁹

A law disapproved by the new tribunal, and subsequently validated by the legislature, would doubtless have to be reëxamined if

rejected; and in view of what has been said as to the feasible limits of constitutional checks upon legislation it has seemed doubtful whether, in case of difference of opinion between a tribunal and the legislature upon matters of fact of the character under consideration, the tribunal can do more than merely suspend the law. This form of remedy, however, would be well worth a trial if it is not desired to go farther.

Perhaps the most logical, and at the same time most comprehensive, remedy would be to provide that in no ordinary case should the courts refuse to recognize any act of the legislature which has not been invalidated by a proceeding *in rem*, but to provide that they might suspend the case to enable such proceedings to be brought, and further to provide special proceedings by which, after notice to the Attorney-General and all other persons interested, giving them an opportunity to be heard, a law might be permanently validated or invalidated. See *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227 (1908). Upon these special proceedings the courts would finally determine the case in pure matters of construction, declaring the law valid or invalid; but in matters dealing purely with questions of public fact of the class considered in the text, the case would be transferred to the new tribunal, which should have only the power to suspend. The remedy suggested in the text, however, seems to preserve most of the advantages of this last remedy; and I have adopted it as most nearly approximating that other remedy which is the subject of discussion.

⁵⁹ *Reetz v. Michigan*, 188 U. S. 505, 507 (1903).

again attacked under the federal Constitution, even though so far as the state constitution is concerned it is valid for all time.

It should be added that in case a state law is held invalid by a state court solely under the federal Constitution, Congress would do well to provide more fully for an appeal to the Supreme Court of the United States.⁶⁰

One word in conclusion. The foregoing suggestions are offered in a purely tentative manner; and, if in any measure they stimulate on the part of members of the bar further consideration of ways and means for curing what I conceive to be a real and substantial defect in the existing system of constitutional law, their purpose will have been accomplished.

John G. Palfrey.

BOSTON, MASSACHUSETTS.

⁶⁰ Cases like *Missouri v. Andriano*, 138 U. S. 496 (1891), would be likely to give trouble in case the state attempted to appeal. In case of an appeal by an ordinary party to a civil case, cases like *Nutt v. Knut*, 200 U. S. 12 (1906), would govern.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President*.
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer*.
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,
FRANCIS S. WYNER.

TORT LIABILITY FOR BREACH OF STATUTORY DUTY. — Where a statute simply attaches a criminal penalty to the doing or omitting of some specified act it can hardly be said to give an individual a private right of action by implication for any injury not of the sort which it was designed to prevent.¹ And even if the injury suffered be of the very sort which the statute was designed to prevent, it would seem from the fact that the only liability provided for is a penalty recoverable by the state that the purpose expressed by the act is to protect society's interest in the public safety rather than to give individuals redress for wrongs which may be done them.² Accordingly, if such a statute is to enlarge the private rights of individuals, this result must be due not to mere interpretation of the statute as an expression of the legislative will, but to the common-law conception of the interrelation of public and private duties.

It was laid down broadly in the earlier cases that, as a result of the Statute of Westminster,³ the common law gives a cause of action to any person injured as a result of the violation of a statutory duty.⁴ It is now recognized, however, that the Statute of Westminster has no effect upon subsequent legislation,⁵ and it is generally admitted that, where

¹ *Gorris v. Scott*, L. R. 9 Exch. 125.

² *Mack v. Wright*, 180 Pa. St. 472, 36 Atl. 913.

³ STAT. WESTMINSTER II (13 Edw. I.) c. 50. This chapter was placed at the end of a series of enactments on various subjects and provided that "concerning the statutes where the law faileth, and for remedies . . . suitors . . . shall have writs provided in their cases."

⁴ *Couch v. Steele*, 3 E. & B. 402; *Aldrich v. Howard*, 7 R. I. 199.

⁵ See *Heeney v. Sprague*, 11 R. I. 456, 463.

there is a mere omission of a statutory duty and no affirmative illegal conduct, no action lies unless the statute was designed to prevent the kind of injury which has occurred.⁶ A recent Kansas decision which adopts the broad doctrine would therefore seem to be erroneous, although the actual result reached may perhaps be justified.⁷ *Stanley v. Atchison, Topeka, & Santa Fé Ry. Co.*, 127 Pac. 620 (Kan.).

There is, however, another almost equally sweeping doctrine which still has considerable vitality, namely, that the common law holds a man responsible for all injuries resulting from his unlawful acts.⁸ This rule has been defended on the ground that the ordinary principle of non-liability for inevitable accident is based on the need of encouraging human activity; from which it logically follows that no such immunity should exist where the activity is of a sort which the law expressly discourages.⁹ But apart from the necessity of encouraging activity, it is certainly inexpedient for the law to interfere to shift the burden of injury where neither party is at fault. The fault involved in violating some unimportant statute not enacted for the prevention of the kind of injury in question is not sufficient to bring about a different result. On principle, therefore, the theory of absolute liability for unlawful acts should, at any rate, be limited to breaches of the peace,¹⁰ and to crimes involving moral turpitude.¹¹ The trend of modern authority is strongly in this direction.¹²

⁶ *Gorris v. Scott*, *supra*; *Bischof v. Illinois Southern Ry. Co.*, 232 Ill. 446, 83 N. E. 948; *Hocking Valley Ry. Co. v. Phillips*, 81 Oh. St. 453, 91 N. E. 118.

⁷ A railroad was held liable because it failed to perform its statutory duty to keep in repair a division fence between its right of way and the plaintiff's land, with the result that the plaintiff's cattle strayed away and were lost. The purpose of the statute was clearly to prevent accidents from happening on the right of way. *Missouri Pacific Ry. Co. v. Harrelson*, 44 Kan. 253, 24 Pac. 465. Nevertheless, since the statute gave the plaintiff a right to charge the expense of building the fence to the railroad company in case of its refusal to build it, the duty to build and maintain the fence would seem to have been made a duty to the plaintiff, who could therefore sue for any damage which was the natural consequence of the failure to perform it. KAN. GEN. STAT., 1909, §§ 7075-7078. The principal case is, however, opposed to the construction generally put upon similar statutes in other jurisdictions. *Frisch v. Chicago G. W. R. Co.*, 95 Minn. 398, 104 N. W. 228; *Hocking Valley Ry. Co. v. Phillips*, *supra*.

⁸ *Owings v. Jones*, 9 Md. 108; *Salisbury v. Herchenroder*, 106 Mass. 458; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 173.

⁹ BISHOP, NON-CONTRACT LAW, §§ 176-178; 15 HARV. L. REV. 225.

¹⁰ The obligation to keep the peace being imposed for the benefit of the public generally, a breach of the peace should give an action to anyone injured thereby. *James v. Campbell*, 5 C. & P. 372; *Vanderburgh v. Truax*, 4 Den. (N. Y.) 464; *McGee v. Vanover*, 147 S. W. 742 (Ky.).

¹¹ It is by no means clear that the immorality of the defendant's act is a sufficient reason for imposing liability upon him. There seems to be some justice, however, in holding that if a defendant insists on engaging in an indefensible course of action, he rather than the person injured by his wrongful conduct should bear the burden of the injury which results therefrom. *Osborne v. Van Dyke*, 113 Ia. 557, 85 N. W. 784. See 15 HARV. L. REV. 225.

¹² The following cases are opposed to the doctrine of absolute liability for illegal action. *Tingle v. Chicago, B. & Q. Ry. Co.*, 60 Ia. 333, 14 N. W. 320; *Lopes v. Sa-huque*, 114 La. 1004, 38 So. 810; *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404. See *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 163, 60 S. E. 1068, 1071. Another line of cases holding that violation of a prohibitory ordinance is only *prima facie* evidence of negligence, although generally disapproved of, shows how strong a tendency exists to depart from the rule of absolute liability. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310.

Where, however, the statute requires a certain standard of conduct in a case in which a duty of care existed at common law, another view is that the statute amounts to a legislative definition of due care under the circumstances in question. Although the language of a few of the cases lends some support to this contention,¹³ the courts do not appear to make any distinction between cases where the statute creates a new duty and those where it merely enlarges an old one,¹⁴ and such a distinction seems undesirable. Moreover, the legislature sometimes prohibits conduct which, though it is so often fraught with danger that it is thought to be for the public interest to forbid it, is not dangerous in every particular case. Therefore the prohibition of the conduct can hardly be regarded as a declaration by the legislature that no prudent man would engage in it under any circumstances.

It would seem, then, that the theory of tort liability for the violation of a statute is not the necessary consequence of any common-law principle. Nevertheless, as is illustrated by the law of public and private nuisance, the common law is in general as solicitous of the private as of the public interest in safety and well-being. Therefore, even though it is not necessarily true that a duty imposed for the protection of the plaintiff is a duty owed to him, the courts would seem to be justified in holding that where the legislature has recognized that a certain standard of conduct is required to safeguard the social interest in preventing some particular danger, a similar standard ought also to be maintained at common law to protect the individual interest.¹⁵

STATE AND NATIONAL REGULATION OF INTERSTATE AND FOREIGN COMMERCE IN INTOXICATING LIQUORS. — Although the United States Constitution gives to Congress the power to regulate interstate and foreign commerce,¹ the states, if Congress has not acted, may regulate matters as to which uniformity is unnecessary.² The states also seem to

¹³ *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543; *Sharkey v. Skilton*, 83 Conn. 503, 77 Atl. 950.

¹⁴ Whenever it is established that a statute was enacted to prevent the sort of injury which has occurred, the courts lay it down broadly that a violation of the statute, either by act or omission, is negligence. *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; *Tobey v. Burlington, C. R. & N. Ry. Co.*, 94 Ia. 256, 62 N. W. 761; *Leathers v. Blackwell Durham Tobacco Co.*, 144 N. C. 330, 57 S. E. 11. Moreover, this language is used in cases where the court recognizes that there was no pre-existing duty of care. See *Hayes v. Michigan Central R. Co.*, 111 U. S. 228, 236, 4 Sup. Ct. 369, 372; *Butz v. Cavanaugh*, 137 Mo. 503, 511, 38 S. W. 1104, 1105.

¹⁵ If the ground of liability be thus a duty to the plaintiff, and not a doctrine of absolute liability for the consequences of illegal conduct, it seems clear that no action should lie unless the injury be the natural result of that breach of duty and not merely a fortuitous consequence of the illegal course of action. *Rich v. Asheville Electric Co.*, 152 N. C. 689, 68 S. E. 232; *Bourne v. Whitman*, *supra*. *Contra*, *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860.

¹ U. S. Const., Art. 1, § 8.

² Thus the state may regulate pilotage. *Cooley v. Board of Wardens*, 12 How. (U. S.) 299. Or the qualifications of an interstate engineer. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564.

have reserved certain inherent police powers.³ Yet in 1888 it was determined that on neither of these grounds could a state control an interstate shipment of liquor while still in the hands of the carrier.⁴ The court seemed to think that an interpretation of the police powers reserved by the state wide enough to permit them to regulate such a customary article of commerce would lead to chaotic restrictions as to other subject matters and destroy the uniformly free intercourse which the Constitution aimed to secure.⁵ The doctrine which the court reached from this argument seems to be that in all matters requiring uniformity the jurisdiction of Congress is exclusive, and that the determination of what is a fit article for interstate free trade is a matter requiring uniformity. It is clear that the regulation of interstate liquor traffic would involve such a determination. Two years later the same doctrine was followed in holding that imported liquor was not subject to state control so long as it remained in the original packages.⁶ The unfortunate situation created by these decisions was somewhat alleviated by the Wilson Act of 1890, which declared that "all intoxicating liquors . . . transported into a state . . . shall upon arrival in such state . . . be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers" . . . as if produced therein.⁷ The constitutionality of the act was upheld the following year.⁸

In view of the preceding cases, but two explanations of the decisions seem possible. The first is that Congress established a uniform rule by specifying a particular article of interstate commerce which after a certain point in its interstate career should be subject to police regulation. But the attempt to apply this theory to this Act produces a result inconsistent with the former decisions, since, instead of itself determining whether liquor is or is not a fit subject matter for complete interstate free trade, Congress in fact permits the state to do so. If the power was vested exclusively in Congress as previously held it could not be thus delegated. The sounder theory is that, as the power to regulate is given fundamentally to Congress, its declaration that uniformity as regards a particular subject is unnecessary should be accepted unless unreasonable, while if Congress has not acted the spirit of the Constitution requires that uniformity be preserved, whenever in the opinion of the court it is desirable.⁹ It might be objected to this argument that the discretion of

³ Thus the state may regulate the sale of imitation butter shipped from without even though still in the original packages. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154. Or prohibit the importation or exportation of game in the closed season. *Sily v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600.

⁴ *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 8 Sup. Ct. 689.

⁵ Note the language of *Matthews, J.*, 125 U. S. 465, 494, 8 Sup. Ct. 689, 705.

⁶ *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. The power to regulate liquor was regarded in 1847 as one of the police powers reserved by the states. The *License Cases*, 5 How. (U. S.) 504. This view, it is submitted, was sound. The exclusion of the power to regulate liquor from the reserved police powers seems inconsistent with the decisions in note 3, *supra*, and with the wide police powers over intrastate liquor reserved to the states after the Fourteenth Amendment. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273.

⁷ 26 U. S. STAT. AT LARGE, 313.

⁸ *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865.

⁹ See *In re Rahrer*, 140 U. S. 545, 561, 562, 11 Sup. Ct. 865, 869.

a state legislature should also be accepted unless unreasonable, even when it is exercising police powers to which the commerce clause has been held paramount, and that a decision that the state legislature has gone beyond its discretion because uniformity is essential, marks the bounds of reasonableness within which Congress also must keep. But the states, having abdicated their powers by the Constitution, it may be answered, must keep within the narrower bounds of desirability unless Congress by declaring uniformity unnecessary expressly makes their legislative scope coincide with its own.¹⁰ But whatever the theory, the constitutionality of the act is too well settled to question.¹¹

The act has been limited by construction, however, to apply only after the liquor has reached the consignee.¹² Thus a state cannot author-

¹⁰ The doctrines involved in these decisions have lately acquired additional interest by the passage of the WEBB ACT. The act provides that the "transportation . . . of liquor . . . into any state, which . . . liquor is intended by any person interested therein to be received, possessed, sold, or kept or in any manner used, either in the original package or otherwise in violation of any law of such state . . . is hereby prohibited." It seems clear that Congress can make a rule stating conditions under which liquor is and is not to be considered a lawful article of interstate commerce. That one of these conditions is the existence of some state law forbidding some use of liquor would not apparently make the act bad as delegating power to state legislatures to make federal law. Cf. *People v. Fire Association of Philadelphia*, 92 N. Y. 311; *State v. Insurance Co. of North America*, 115 Ind. 257, 117 N. E. 574. Moreover, as it is clear that the state law referred to must be constitutional according to standards previously established, the act does not directly abdicate any portion of the exclusive jurisdiction of Congress. Hence the act seems valid in so far as it is a direct regulation by Congress.

But as no penalty is provided for the infringement of the act, its practical efficiency depends upon whether or not it indirectly enables the states to confiscate liquors shipped in violation of its conditions. It is by no means clear that the act will have such an indirect effect. If the act can be construed to mean that such liquor is not to be regarded as a subject matter of interstate commerce, then under the first theory discussed above it automatically becomes subject to the state police powers. And the objection that Congress permits the states to determine whether liquor is or is not a fit subject matter for interstate free trade, is not present at least in form. Or if the act can be construed as a declaration of Congress, that the proper regulation of interstate liquor traffic varies with conditions existing in the several states, and hence that uniformity is unnecessary where liquor is intended to be used for an unlawful purpose, then under the second theory such liquor would automatically become subject to state police control. It is true that as to regulations affecting transit uniformity is more desirable than as to those operating only after the goods have reached the consignee, since in the former case to avoid illegal action the seller must be aware of the local rule of every state and town in the nation, while in the latter the consignee need only be familiar with the rule in his own district. Yet undoubtedly Congress could make the intent of "any person interested therein" to use liquor in specified ways a test of illegality; and this condition alone would cast nearly as great a risk on the seller. Hence, in view of the actual diversity of conditions among the several states, it seems clear that Congressional discretion has not been abused outrageously in saying that uniform regulation in each locality is unnecessary.

If either of these interpretations of the Webb Act can be made, a state statute to the effect that "all liquor shipped into this state for illegal purposes may be confiscated," should be sustained. But otherwise it would seem that liquor shipped in violation of the Webb Act, even though such shipment be an offense against the federal government, is still within the exclusive jurisdiction of Congress, and beyond the scope of state legislative control.

¹¹ See *Delamater v. South Dakota*, 205 U. S. 93, 98, 27 Sup. Ct. 447.

¹² *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664. This is true even when liquor is shipped C. O. D. and title passes only on delivery, thus making the sale take place in the "dry" state. *American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. 182. And

ize seizure in transit even though the consignee be an inebriate;¹³ or prevent one from ordering a consignment for his own use.¹⁴ Nor can a carrier refuse a consignment under cover of state prohibition.¹⁵ But the state may regulate the sale of liquor on an interstate steamboat while within its boundaries¹⁶ or the solicitation of orders for interstate shipments.¹⁷ A recent decision holds that under the Wilson Act a state license tax as applied to foreign liquors is valid. *De Bary & Co. v. Louisiana*, 227 U. S. 108, 33 Sup. Ct. 239. This seems sound. A liquor regulation, even though it takes the form of a high license tax productive of revenue, is a "police regulation," if so intended, within the meaning of the Wilson Act;¹⁸ and though a distinction is made as to the taxation of interstate and foreign goods, it seems to be founded on the provision of the Constitution forbidding states to lay imposts.¹⁹ Since this statute does not discriminate against foreign liquors and bears no relation to the value of the goods imported, it cannot be objected to as an "import duty."²⁰

VALIDITY OF FOREIGN MARRIAGES. — Marriage is a status the creation of which involves a contract made between parties who have a capacity to contract, in accordance with a ceremony prescribed by law. A status being a legal condition, of interest chiefly to the sovereign of the domicile, is usually created by the *lex domicilii*.¹ It would be logical to apply the rule to the creation of the status of marriage. But practical objections of great weight oppose this, especially when the parties are domiciled under different sovereigns. They might be married in one jurisdiction and unmarried in another. The succession of property, legitimacy of issue, and the prevention of concubinage necessitate a rule which will secure uniformity.² The rule that the *lex loci contractus* governs alone accomplishes this result.³ Consequently it is a general rule of the common law that a

after the carrier's liability has become that of a warehouseman. *Heyman v. Southern R. Co.*, 203 U. S. 270, 27 Sup. Ct. 104.

¹³ *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633.

¹⁴ *Scott v. Donald*, 165 U. S. 58, 107, 17 Sup. Ct. 262, 265; *Vance v. Vondercook*, 170 U. S. 438, 18 Sup. Ct. 674.

¹⁵ *Louisville & Nashville R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189.

¹⁶ *Foppiano v. Speed*, 199 U. S. 501, 26 Sup. Ct. 138.

¹⁷ *Delamater v. South Dakota*, *supra*. This case does not come within the letter of the Wilson Act. The court feels that it is within the spirit of the act and analogous to insurance regulations.

¹⁸ *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25 Sup. Ct. 552; *Phillips v. City of Mobile*, 208 U. S. 472, 28 Sup. Ct. 370.

¹⁹ See *American Steel Wire Co. v. Speed*, 192 U. S. 500, 521, 522, 24 Sup. Ct. 365, 370, 371; *May v. New Orleans*, 178 U. S. 496, 507, 20 Sup. Ct. 976, 979.

²⁰ See *American Steel Wire Co. v. Speed*, 192 U. S. 500, 522, 24 Sup. Ct. 365, 370. It is worthy of note, however, that in the leading case of *Brown v. Maryland*, 12 Wheat. (U. S.) 419, the duty bore no relation to the value of the goods, but was simply a tax on the privilege of importing. This difficulty seems to have been disregarded in the cases. As that statute was discriminatory the cases are clearly distinguishable.

¹ *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915. See 3 Beale, *Cases on Conflict of Laws*, 516.

² See *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395, 416-417.

³ See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 845.

marriage valid where celebrated is valid everywhere.⁴ Thus the form of the ceremony is always governed by the *lex loci contractus*.⁵ So also in the United States⁶ and in the most recent cases in England⁷ the common-law rule that capacity in general is determined by the *lex loci contractus*⁸ applies as well to capacity to contract marriage. This is true even though one of the parties was under a penal disability at his domicile⁹ and married in a foreign jurisdiction to evade the law of the domicile.¹⁰

Two exceptions to the general rule, however, are commonly noted. First, it is said that a marriage contrary to the recognized Christian conception of that relation, as, for example, a polygamous marriage, is not valid.¹¹ But since it is a right created by law it must be recognized everywhere as such, even in a state where it could not be created; although the effect usually given to the marriage status need not be given to it.¹² Second, when contrary to a positive statutory prohibition of the sovereign of the domicile, as a marriage incestuous by local law but not universally so treated,¹³ or one involving miscegenation,¹⁴ the marriage

⁴ STORY, CONFLICT OF LAWS, § 113. The converse is not always true, at least in England. *Ruding v. Smith*, 2 Hagg. Cons. 371. The argument made is that if there is no law or it is impossible or very difficult to comply with its requirements, necessity makes the marriage valid if contracted according to forms prescribed by the *lex domicilii*. See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 890. But where there is no law it seems impossible in the common-law view of territorial law that a valid marriage could take place. Cf. *Norman v. Norman*, 121 Cal. 620, 54 Pac. 143.

⁵ *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54; *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 395.

⁶ *State v. Richardson*, 72 Vt. 49, 47 Atl. 103; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193. Some cases apparently hold that the *lex domicilii* governs capacity. *Greenhow v. James' Exec.*, 80 Va. 636. The decisions are preferably to be explained as examples of the exception to the rule of the *lex loci*, discussed *infra*. One case holds that a marriage forbidden by the sovereign of the nationality will be void even though contracted at the domicile of the parties according to its laws. *Roth v. Roth*, 104 Ill. 35. This seems an indefensible decision, especially as the question related to the descent of Illinois land.

⁷ *Ogden v. Ogden*, [1908] P. 46; *Chetti v. Chetti*, [1909] P. 67. In these two cases the conclusion is reached after a very full discussion. But the English decisions are extremely confused. See 22 HARV. L. REV. 439.

⁸ *Male v. Roberts*, 3 Esp. 163; *Milliken v. Pratt*, 125 Mass. 374. See 15 HARV. L. REV. 382, 385-388. In the Civil law capacity is treated as personal status and therefore controlled by the law of the domicile or nationality. STORY, CONFLICT OF LAWS, § 51 *et seq.* There are, however, many exceptions to the rule. See 3 Beale, Cases on Conflict of Laws, 516.

⁹ *Commonwealth v. Lane*, 113 Mass. 458.

¹⁰ *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Stevenson v. Gray*, 17 B. Mon. (Ky.) 193. *Contra*, *Stull's Estate*, 183 Pa. St. 625, 39 Atl. 16. A number of states have enacted statutes declaring a marriage contracted abroad by its citizens to evade its laws to be invalid. D. C. CODE, § 1287; GA. CODE, § 2424; IND. LAWS, 1905, c. 126, p. 215; LA. ACTS, 1904, No. 129, p. 293; ME. REV. STAT. c. 61, § 9; MD. PUB. GEN. LAWS, Art. 27, § 302; MASS. REV. LAWS, c. 151, § 10; MISS. CODE, § 1033.

¹¹ *Hyde v. Hyde*, L. R. 1 P. & D. 130. For a discussion of the validity of tribal marriages, see 25 HARV. L. REV. 374.

¹² See 3 Beale, Cases on Conflict of Laws, 517.

¹³ *Brook v. Brook*, 9 H. L. Cas. 193. Some of the judges proceeded on the domiciliary theory.

¹⁴ *State v. Kennedy*, 76 N. C. 251; *Kinney v. Commonwealth*, 30 Gratt. (Va.) 858. Where the parties were married while domiciled under a sovereign permitting miscegenation, the validity of the marriage will be recognized in a state where such a marriage is illegal. *State v. Ross*, 76 N. C. 242. *Contra*, *State v. Bell*, 7 Baxt. (Tenn.) 9. It is argued that the validity of a marriage should depend on the "distinctive national

is invalid. A recent Illinois case has construed a statute prohibiting remarriage of a divorced person within a year as invalidating a marriage contracted by its citizens in Missouri within that period.¹⁵ *Wilson v. Cook*, 100 N. E. 222. This second class of cases has been severely criticized,¹⁶ and the expediency of the decisions may well be doubted. But every state should have the power to control the status of its citizens wherever they may be. The law should give effect to the *lex loci*, therefore, only when the state of domicile consents to the creation of a status. Such a consent is ordinarily presumed, but when the state exercises its ultimate power to forbid the creation of the status, as the court thought was done by the statute in the principal case, the marriage should everywhere be treated as invalid, even though the requirements of the *lex loci* were fulfilled.¹⁷ Whether the sovereign has exercised this power is a question of legislative intent.¹⁸ The statute, however, should never be held to have extraterritorial effect unless it is a necessary construction, because of the strong public policy in favor of the validity of marriage. Consequently where one section of the code provides that marriages valid where contracted are valid in the state a marriage contracted abroad within the prohibited period will be held valid. *Griswold v. Griswold*, 129 Pac. 560. (Colo., Ct. App.)¹⁹

If the above analysis of the Illinois case is correct the parties could remarry within the year by acquiring a domicile under another sovereign.²⁰ A possible construction of the statute there considered is that it operates as a limitation on the decree of divorce.²¹ Statutes prohibiting marriages during the period allowed for an appeal are generally so construed.²² But since under this view the parties are not absolutely divorced until a year has elapsed they could not contract a valid marriage anywhere during that time. The great diversity of judicial decision on this subject emphasizes the necessity of a uniform marriage law.

policy" of the state. WHARTON, CONFLICT OF LAWS, § 165. The difficulty with this view is that the status would change as the parties moved from one state to another, and the essential quality of uniformity would be gone.

¹⁵ *Accord*, *Lanham v. Lanham*, 136 Wis. 360, 117 N. W. 787. *Contra*, *Wood's Estate*, 137 Cal. 129, 69 Pac. 900; *Dudley v. Dudley*, 151 Ia. 142, 130 N. W. 785. Since the statute applies to both parties to the divorce it is not a mere penal statute. The cases *contra* to the principal case construe the statute as not having any extraterritorial operation. This construction secures a more just result, and if permissible is preferable. But the court's interpretation probably accords with the legislative intent.

¹⁶ See 1 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 875 *et seq.*

¹⁷ No case has yet arisen which tests the theory this far. As a matter of fact the courts would probably refuse to carry the reasoning to its logical extent.

¹⁸ *Lanham v. Lanham*, *supra*.

¹⁹ Approved and followed in the Supreme Court of Colorado. *Loth v. Loth's Estate*, 129 Pac 827 (Colo., Sup. Ct.).

²⁰ *Pierce v. Pierce*, 58 Wash. 622, 109 Pac. 45; *State v. Fenn*, 47 Wash. 561, 92 Pac. 417.

²¹ *Warter v. Warter*, 15 P. D. 152.

²² *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802; *Pettit v. Pettit*, 105 N. Y. App. Div. 312, 93 N. Y. Supp. 1001. *Contra*, *Willey v. Willey*, 22 Wash. 115, 60 Pac. 745. A marriage within the state during the period allowed for appeal was upheld, on the ground that the party was the only one who could appeal, and it was within his power to waive it. *Wallace v. McDaniel*, 59 Or. 378, 117 Pac. 314. By this case the guilty party, but not the innocent party, can remarry within the period.

STATE CONTROL OVER INTERSTATE RAILROAD RATES BY CONDITIONS IN CHARTERS OR LEASES. — In a recent case it was held that a state cannot reserve the right to fix interstate rates as a condition in a lease of a railroad, or in a charter of incorporation. *State v. Western & Atlantic R. Co.*, 76 S. E. 577 (Ga.). Aside from the question of interstate commerce, if the conditions amount to a contract setting a standard by which the rate is fixed, it would seem on principle that it should be void on the one hand as an attempt to barter away the state's governmental function of regulating public service companies,¹ and on the other as an interference with the proper performance of the carrier's duties by rendering him liable to work for less than a reasonable return.² By the weight of authority, however, such contracts are binding³ and the decision must turn upon the fact that the commerce was interstate.

Since a state may not exclude a corporation engaged in interstate commerce from its borders, it may impose no condition upon its entry to do interstate business that it could not impose as a direct regulation.⁴ But a state may always refuse the privilege of incorporation. Where the price of the privilege, however, is regulation of matters in which the Constitution gives Congress exclusive control, there is a clear invasion of the Congressional prerogative.⁵ Regulation of interstate rates has always been considered a matter in which uniformity was so necessary that it was within the exclusive control of Congress.⁶ This was definitely settled when Congress precluded the possibility of direct state action by the passage of the Interstate Commerce Act.⁷ Since almost all railroads are state corporations, if the states could gain control by conditions in the charter, the exclusive power of Congress would be largely usurped.⁸

If the condition be treated as an agreement between the state in its non-governmental capacity as lessor and the railroad as lessee, the result is the same. Even if the contract were not void on the general principles of public service, it would have to yield to legislation by Congress fixing rates.⁹

¹ *Laurel Fork & Sand Hill R. Co. v. West Virginia Transportation Co.*, 29 W. Va. 324. In the principal case, however, the state reserved its control over rate fixing.

² See *Woodstock Iron Co. v. Richmond & Danville Extension Co.*, 129 U. S. 643, 662, 9 Sup. Ct. 402, 409.

³ *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 22 Sup. Ct. 410; *Minneapolis v. Minneapolis Street Ry. Co.*, 215 U. S. 417, 30 Sup. Ct. 118; *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 24 Sup. Ct. 310. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1421.

⁴ *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 90; *Pullman Co. v. Kansas*, 216 U. S. 54, 30 Sup. Ct. 232. But see 24 HARV. L. REV. 635, 640; 23 *id.* 549. Of course in those cases in which the state has power to legislate in the absence of inconsistent legislation by Congress, conditions may be imposed.

⁵ It is certain that all such conditions must yield to inconsistent legislation by Congress, and it is submitted that the result is the same where, although Congress has not acted, its power is exclusive.

⁶ *Wabash, St. Louis, & Pacific Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4.

⁷ *Louisville & Nashville R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277. *Cf. Southern Ry. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140; *Gulf, Colorado, & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802.

⁸ Of course Congress could incorporate railroads and in a measure avoid this result.

⁹ *Louisville & Nashville R. Co. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265.

And although this legislation merely sets a maximum, and the rate agreed upon is within it, it is submitted that the detailed provisions of the Interstate Commerce Act show the intent of Congress to allow no interference with rate-fixing except by its own regulations.¹⁰ The carrier is commanded to file reasonable rates,¹¹ and a contract fixing those rates, or delegating their fixing to another, would seem to violate the spirit of the act. The lessor, it is true, could have fixed the rates had he not leased the road, but the lessee is now the carrier subject to the act.¹²

The situation of the railroad, then, may be precarious. If the charter only confers the right to charge rates fixed by the state, any other rates are *ultra vires* and render the charter forfeitable. If charging rates fixed by the state is a condition precedent to incorporation, the railroad never becomes incorporated. If this is a condition subsequent, however, the right of the state to forfeit the executed charter never arises. But the performance of the illegal condition may be such a substantial portion of the transaction that the whole transaction is void, and no corporation is created. Similarly in the case of a lease, if charging the state rates is a condition precedent, the term never vests; if a condition subsequent, the right to divest it never arises.¹³ However, if the performance of the condition is so vital a portion of the consideration for the lease that its illegality renders the lease void, the lessor could recover the premises.¹⁴

CONSTRUCTIVE NOTICE OF THE CHARTER OF A CORPORATION. — The doctrine that one dealing with a corporation has constructive notice of the provisions of its charter has brought great confusion into the law of corporations. Probably no court rejects it entirely;¹ and yet no court dares to apply it without restriction. Although the English court has been the most consistent supporter of the doctrine,² an Australian court refused to follow it in a late case, where the *bonâ fide* purchaser of stock, marked "paid up," was not charged with notice of the articles of association³ which showed that this stock was issued at less than par.⁴ *In re*

¹⁰ See *Southern R. Co. v. Reid*, 222 U. S. 424, 438, 32 Sup. Ct. 140, 143.

¹¹ Section 1.

¹² See NOYES, *INTERCORPORATE RELATIONS*, 2 ed., § 230.

¹³ 1 TAYLOR, *LANDLORD AND TENANT*, 9 ed., § 281.

¹⁴ Cf. *Berni v. Boyer*, 90 Minn. 469, 97 N. W. 121; *White v. Franklin Bank*, 22 Pick. (Mass.) 181; *Taylor v. Bowers*, 1 Q. B. D. 291. See KEENER, *QUASI-CONTRACTS*, 259. The illegality here is clearly not of such a degree as to preclude any recognition of the transaction by the courts as a basis of rights.

¹ New York has perhaps departed as far as any court from the old notions of *ultra vires*. *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258. But see *Adrian v. Roome*, 52 Barb. (N. Y.) 399, 411. Also see 9 HARV. L. REV. 270.

² See *East Anglian Rys. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, 811; *Ridley v. Plymouth, Stonehouse, and Devonport Grinding and Baking Co.*, 2 Exch. 711, 717.

³ It might be argued that this case is distinguishable by treating the articles of association as similar to by-laws rather than to an American charter. See COOK, *CORPORATIONS*, § 725; *Ashbury Ry. Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, 667. But the articles of association are registered with the memorandum of association and with the same formality. 8 Edw. 7, c. 69, § 15. Also see *Ernest v. Nicholls*, 6 H. L. 401, 419; *Fontaine v. Carmarthen Ry. Co.*, L. R. 5 Eq. 316, 322.

⁴ Probably the weight of authority treats stock-certificates as negotiable and thus

Victoria Silicate Brick Co., Ltd., [1912] Vict. L. R. 442. The English court also departed from its doctrine that constructive notice is equivalent to actual knowledge in holding an agent on a warranty of the capacity of the corporation on an extension of *Collen v. Wright*,⁵ since if the outsider had notice of the charter there would be no deception.⁶ In the United States the doctrine of constructive notice has brought similar anomalous results.⁷

The history of the doctrine will perhaps show the causes of the confusion. In the early days of corporations when charters were sparingly granted by public act and usually for a quasi-public purpose a charter was properly regarded as a very special privilege.⁸ There was a grave doubt as to the corporation's having the power to do an *ultra vires* act — i. e., an act unauthorized by its charter.⁹ But at any rate it was to be most severely condemned and prevented by stringent measures. So the courts were ready to say that anyone dealt with a corporation at the peril of the transaction's being *ultra vires*. The court then framed the rule in the language of constructive notice and said that anyone dealing with the corporation was presumed to have notice of the act of incorporation.¹⁰ That conception was hardly settled in the judicial mind before an extraordinary growth began. Incorporation was transformed from a privilege into a right. Myriad charters for entirely private purposes and for nearly any legal purpose were filed with the proper official under a general incorporation law. These charters, although filed in a public place, could not in any proper sense be called public laws; yet the courts still adhered to the old language of constructive notice of their contents. The doctrine has developed naturally. At no time was the change sufficiently violent to induce a change in the rule. Yet to-day it seems an anachronism.

If this analysis has been correct the modern court should look behind the old fiction and see if its reason still persists.¹¹ Do the interests of

protects a *bonâ fide* purchaser. *Steady v. Little Rock and Ft. Smith R. Co.*, 5 Dill. (U. S.) 348; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814. *Contra*, *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411. But by hypothesis in the principal case the purchaser could not be *bonâ fide* since he would know that he was dealing with an obligation of the corporation and so would have constructive notice of the articles. The situation is analogous to the issue of negotiable paper *ultra vires* when a *bonâ fide* purchaser recovers if it is merely the abuse of a limited power, since the charter would not show the violation; but he fails if the corporation has no power of issue whatever. *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 9 N. W. 799; *Root v. Wallace*, 4 McLean (U. S.) 8. See 23 HARV. L. REV. 567.

⁵ 7 E. & B. 301, 8 E. & B. 647.

⁶ *Richardson v. Williamson*, L. R. 6 Q. B. 276. See NOTES, p. 542.

⁷ See 24 HARV. L. REV. 539.

⁸ See *Pearce v. Madison and Indianapolis R. Co.*, 21 How. (U. S.) 441; *ANGELL & AMES, CORPORATIONS*, 11 ed., §§ 13, 60-66.

⁹ *Hood v. New York and New Haven R. Co.*, 22 Conn. 502; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43. But see 23 HARV. L. REV. 495.

¹⁰ See cases cited under note 2, *supra*. This was an easy step from the old maxim "Everyone is presumed to know the law," which seems an unfortunate statement of the maxim "Ignorance of the law excuses no man."

¹¹ Constructive notice was never a reason but a method of stating a result. Yet in 1890 the Supreme Court gave it as one of the three reasons for its doctrine of *ultra vires*. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 489.

the state or of third parties require that in regard to their respective rights in the particular case strangers should deal with corporations at the peril of the transaction's being *ultra vires*? This view would make it clear that constructive notice is not, like actual knowledge, a reason in itself for defeating an otherwise innocent stranger and would avoid the mental entanglement inevitably involved in attributing constructive notice of the charter to an outsider in order to postpone him to *intra vires* creditors, and yet in the same transaction treating him as innocent in order to prefer him to the stockholders.¹² By imposing, whenever public policy demands, duties¹³ to look out for the state's interest in such cases as banking transactions, or the interest of *intra vires* creditors,¹⁴ and by applying the common-law rules as to limitations on the authority of an agent,¹⁵ the just results of the constructive notice doctrine are obtained without its misapplications, or the sacrifice of logic. The term "constructive notice" may have had a legitimate meaning in this branch of the law, but it would now seem wiser to abandon it in the interest of clarity of thought.

THE LIABILITY OF AN AGENT OF A CORPORATION FOR ITS ULTRA VIRES CONTRACTS. — If an agent, at the request of the proper officers of a corporation, makes a contract for the corporation which is beyond its powers and upon which it cannot be held, the authorities are divided as to whether or not the outsider can hold the agent personally responsible for any loss that may result.¹ The only basis for holding the agent, in the absence of a conscious misrepresentation, is upon an implied warranty either of his own authority or the capacity of his principal.

It is sometimes said that a corporation cannot have an agent to do an

¹² See *In re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183. This case probably represents the climax in the application of constructive notice. A company with 250 shares distributed largely among the directors did an enormous *ultra vires* banking business extending over fifty years. It failed with deposits totaling £16,000,000. *Intra vires* creditors were justly enough paid first. The shareholders then received the par value of their shares and the depositors were allowed the balance although the court confessed it was illogical to allow them anything.

¹³ Concerning duty as the basis of complaint of *ultra vires* acts, see *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 209, 13 S. W. 822, 827.

¹⁴ See 23 HARV. L. REV. 495.

¹⁵ The cases often seize on constructive notice of the charter to explain the failure of a contract because of a limitation on an agent's authority, but the common-law rules of agency would seem to cover most of the cases. See *Ernest v. Nicholls*, *supra*; *Fontaine v. Carmarthen Ry. Co.*, *supra*.

¹ The authorities divide about evenly upon this point. The following cases hold the agent liable: *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340; *Trust Co. v. Floyd*, 47 Oh. St. 525, 26 N. E. 110; *Small v. Elliott*, 12 S. D. 570, 82 N. W. 92; *Lasher v. Stimson*, 145 Pa. St. 30, 23 Atl. 552. See *Vliet v. Simanton*, 63 N. J. L. 458, 468, 43 Atl. 738. The following cases hold that the agent is not liable to the outsider: *Thilmany v. Iowa Paper Bag Co.*, 108 Ia. 357, 79 N. W. 261; *Sandford v. McArthur*, 18 B. Mon. (Ky.) 411; *Humphrey v. Jones*, 71 Mo. 62; *Abeles v. Cochran*, 22 Kan. 405.

The liability of directors of a corporation is a different question. It seems just that they should be charged with the duty of knowing the extent of the powers of the corporation, and if an outsider cannot hold the corporation on a contract which the directors have induced him to make, he should be allowed to hold them.

ultra vires act. From this it would follow that no agent could have authority to do such an act, and any assumption on his part to make an *ultra vires* contract would subject him to liability for breach of implied warranty of his authority. All courts agree, however, that a corporation may be liable for the torts and crimes of its agents. In the United States, at least, the corporation may be liable in certain cases if the tort occurs during an *ultra vires* undertaking.² So also it may be held on an accommodation note although issued *ultra vires* by an agent.³ It would therefore seem that a corporation did have capacity to appoint an agent to do an *ultra vires* act. And if the proper officers of the corporation instruct the agent to make the contract, his authority would seem to exist in fact and there would be no breach of implied warranty of authority.

The only other ground upon which the agent could be made liable is that he warranted the capacity of his principal to be bound upon the *ultra vires* contract. Assuming, as is held by some courts, that a corporation's non-liability on *ultra vires* contracts results from a lack of capacity,⁴ it has not yet become established in our law that an agent in general warrants his principal's capacity. Such a doctrine would seem an unwarranted extension of the doctrine of *Collen v. Wright*.⁵ Certainly no court would say that an innocent agent warranted that his principal would not interpose any defenses to the contract, or that the principal was solvent. There seems little more reason to hold that the agent warrants the capacity of his principal. A recent case, however, follows the holding in a few jurisdictions that the agent does warrant the corporation's capacity.⁶ *Raff v. Isman*, 84 Atl. 352 (Pa., Sup. Ct.). But these decisions have little weight as bearing on the general question, because in all of them, including the principal case, the agent knew of the lack of capacity.

But even if the agent be held to warrant capacity, it is submitted that the same reasons which prevent a recovery against the corporation should in most cases prevent recovery from the agent. If, as in England, the court in imputing constructive notice of the limitations of the charter to all persons dealing with the corporation,⁷ treats it as if it were

² *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 35 N. E. 776; *Gruber v. Washington & Jamesville R. Co.*, 92 N. C. 1; *Southern Express Co. v. Platten*, 93 Fed. 936; *Ramsden v. Boston & Albany R. Co.*, 104 Mass. 117; *Brokaw v. New Jersey R. & Transportation Co.*, 32 N. J. L. 328; *New York & New Haven R. Co. v. Schuyler*, 34 N. Y. 30. Cf. *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055. In England it seems that a corporation is liable for a tort committed in an *intra vires* business. *Goff v. Great Northern Ry. Co.*, 30 L. J. Q. B. 148. But not if committed in an *ultra vires* undertaking. *Poulton v. London & Southwestern Ry. Co.*, L. R. 2 Q. B. 534. For other authorities, see 24 HARV. L. REV. 543.

³ *Monument National Bank v. Globe Works*, 101 Mass. 57.

⁴ *Re Phoenix Life Assurance Co.*, 2 Johns. & H. 441; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478.

⁵ 8 E. & B. 647. Whether the agent of a married woman warrants her capacity is not clear as a matter of authority, since there was actual fraud by the agent in the only case upon the subject. *Edings v. Brown*, 1 Rich. (S. C.) 255. A recent English case squarely decides that the agent of a lunatic warrants his principal's capacity. *Yonge v. Toynbee*, [1910] 1 K. B. 215. See also *Drew v. Nunn*, 4 Q. B. D. 661, 666.

⁶ *Trust Co. v. Floyd*, 47 Oh. St. 525, 26 N. E. 110; *Small v. Elliott*, 12 S. D. 570, 82 N. W. 92; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340.

⁷ *Ridley v. Plymouth Grinding & Baking Co.*, 2 Exch. 711.

equivalent to actual knowledge, there can be no reliance on the agent and hence no warranty.⁸ It is true that if the only ground for refusing recovery is lack of capacity to contract imposed by the legislature, and the agent warrants that capacity, he should be personally liable. But it is difficult to reconcile this view with the corporation's liability for the torts and crimes of its agents, and no court seems to refuse recovery on this ground alone. On the other hand, if a corporation is relieved on the ground that its *ultra vires* contracts are so illegal that even an innocent party cannot sue on them, there seems less cause to allow recovery against another innocent party on rights arising from the same transaction.⁹ If, as seems the most desirable view, recovery is denied only when a real public policy discourages the particular transaction,¹⁰ it would seem that the same policy would equally prevent the creation of all rights and liabilities.

THE USE OF ANCIENT DOCUMENTS IN EVIDENCE. — The fact that a document is ancient affects its availability in evidence in several ways. In the first place the admission of such a document under certain conditions is allowed without extrinsic proof of its execution and authorship. The principal support in reason for this exception to the general rule is necessity. After many years it may be impossible to produce the author, proof of his handwriting, witnesses of the execution, or any evidence bearing on the genuineness of the document. There is also a probability that instruments in writing are what they purport to be, particularly if formal in nature. While this is not enough in modern documents, in one which has remained so long where a genuine one would be expected, the cumulative evidence of its probable validity is sufficiently weighty not to require further proof. To qualify for admission under the rule, the document must be over thirty years old, must come from a natural custody, and there must be nothing suspicious about its appearance.¹ A further requirement sometimes imposed, if it is a deed or will, is that there must be possession of land according to its terms, to give it some corroboration.² But to-day the weight of authority seems against that requirement;³ in other cases it has been modified by allow-

⁸ If the doctrine of constructive notice were similar to that of constructive notice of incumbrances, and imposed solely for the benefit of third parties, liability of the agent on an implied warranty would not be excluded because it would injure no third parties.

⁹ *St. Louis, Vandalia & Terre Haute R. Co. v. Terre Haute & Indianapolis R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953.

¹⁰ See 23 HARV. L. REV. 495; 24 *id.* 534. At the present time no court will enforce an *ultra vires* contract which is wholly executory. *Garrett v. Kansas City Coal Mining Co.*, 113 Mo. 330, 20 S. W. 965; *Jemison v. Citizens' Savings Bank*, 122 N. Y. 135, 25 N. E. 264; *Simpson v. Building and Savings Association*, 38 Oh. St. 349.

¹ This is the rule laid down in all the cases. *Applegate v. Lexington & Carter County Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742; *Woodward v. Keck*, 97 S. W. 852 (Tex. Civ. App.). Proper custody was not shown in *Swafford v. Herd's Adm'r*, 23 Ky. L. Rep. 1556, 65 S. W. 803; *Chamberlain v. Showalter*, 5 Tex. Civ. App. 226, 23 S. W. 1017. The appearance was suspicious in *Wright v. Hull*, 83 Oh. St. 385, 94 N. E. 813; *O'Neal v. Tennessee Coal, Iron & R. Co.*, 140 Ala. 378, 37 So. 275.

² *McKinnon v. Bliss*, 21 N. Y. 206; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292.

³ *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049; *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59, 72 S. E. 86; *Harlan v. Howard*, 79 Ky. 373.

ing the substitution of any corroborative evidence.⁴ A recent case illustrates the modern tendency to discard it. *Lacey v. Southern Mineral Land Co.*, 60 So. 283 (Ala.). The result of the general rule is that certain facts whose relevancy is clear but usually excluded as insufficient, are admitted to prove that the document was executed in due form and delivered by the man whose name is signed. It follows that his handwriting may be used for comparison if this evidence of the genuineness of the deed is not rebutted.⁵ The acts of delivery and acceptance of the deed may also be evidence, when proved, of certain inferential facts. For example, from a lease may be inferred possession at the time in the lessor.⁶ In inquiring into occurrences of a past generation, courts may well be liberal in allowing more slender inferences than are usually tolerated.

But if a document is ancient it may also be evidence of facts stated therein, as an exception to the hearsay rule. When a deed purports to be executed under a power of attorney, it is usually accepted as evidence of that fact.⁷ The execution of the deed would tend somewhat to prove a valid power to execute it,⁸ but the recital of the power seems really a material part of the evidence. A deed reciting a previous conveyance is also admitted, as evidence of that conveyance, at any rate when the previous deed is shown to be lost.⁹ Mere inference from the grantor's having executed the deed is rather slight proof of there having been a conveyance to him. The recitals appear to be the material part of the evidence. The court in the principal case was liberal, allowing a conveyance to an assignee in bankruptcy to be proved in this manner.¹⁰ As another example of hearsay, pedigree recitals, principally statements of relationship taken as evidence of inheritance or dower rights, have also

⁴ *Johnson v. Timmons*, 50 Tex. 521; *White v. Farris*, 124 Ala. 461, 27 So. 259; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371. See *Cunningham v. Davis*, 175 Mass. 213, 220, 56 N. E. 2, 4.

⁵ *Bell v. Brewster*, 44 Oh. St. 690, 10 N. E. 679; *Woodward v. Keck*, *supra*.

⁶ Because the lessor would not be likely to deliver nor the lessee to accept a lease, unless the lessor had possession. *Bristow v. Cormican*, 3 App. Cas. 641; *Floyd v. Tewkesbury*, 129 Mass. 362. It is to be observed that in either case the inference is to the belief of a human being, and thence to a fact. See 26 HARV. L. REV. 151-153. If, therefore, the delivery of the deed is a human utterance intended to convey thought and not merely an act, this class of cases should be properly classified under the exception to the hearsay rule discussed in the text. It seems that the mere fact that legal consequences are attached to written words, making them a "legal act," should not exclude them from the hearsay rule. Thus the execution of a contract to sell grain with a warranty should not be admissible evidence of the quality of the grain. And in the case of the ancient lease it is not even proved that legal consequences did attach to the execution of the lease. But delivery is not an utterance, and it seems that it is not an act whose apparent purpose is to convey the idea that the grantor is in possession. At any rate the act of the lessee in accepting the deed is not intended to convey thought at all. See 26 HARV. L. REV. 148.

⁷ *Doe d. Clinton v. Phelps*, 9 Johns. (N. Y.) 169; *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014.

⁸ This is the argument in *Watrous v. McGrew*, 16 Tex. 506; *Harrison v. McMurray*, 71 Tex. 122, 8 S. W. 612, and cases cited note 7, *supra*. But in practically all the cases there was a recital of a power. The recital is relied on in *Butterfield v. Miller*, 195 Fed. 200.

⁹ *Deery v. Cray*, 5 Wall. (U. S.) 795, and cases cited. The use of recitals as evidence of claims of title in connection with adverse possession is not hearsay.

¹⁰ Such official acts are sometimes said to be presumed. *Chanler v. Wilson*, 77 Me. 76. But in the principal case the recital was expressly relied on.

been admitted.¹¹ This may well be distinguished from the regular pedigree exception.¹² Again, recitals of boundaries in ancient deeds,¹³ or diagrams in ancient maps,¹⁴ are often admitted to show boundaries as they then existed. This, too, is distinguishable from the more general exception as to boundaries.¹⁵ As may be noted, this admission of hearsay in ancient documents occurs chiefly in connection with title to land,¹⁶ which often involves issues as to rights existing years ago. These often cannot be proved in any other way, and the continuance of evidence, apparently reliable, for so long a time, furnishes a good basis for a hearsay exception.

RECENT CASES.

ADOPTION — DESCENT AND DISTRIBUTION — RIGHT OF FATHER TO INHERIT FROM SON ADOPTED BY ANOTHER. — An adopted son died intestate leaving property acquired solely from his deceased adoptive father. The natural father claimed from the son's widow a father's share in the estate. A statute provided that the foster-parent and the adopted child should "sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation" while the natural parents are "relieved of all parental duties . . . towards . . . the child . . . and have no right over it." *Held*, that the natural father inherits nothing from his son. *In re Jobson's Estate*, 128 Pac. 938 (Cal.).

In many of the states the adoption statutes provide expressly as to inheritance both by and from an adopted child. MASS. REV. LAWS, 1902, c. 154, § 7; N. Y. CONSOL. LAWS, c. 19, § 114, p. 1077. Under statutes providing that the adopted child shall be heir to the foster-parent but silent as to the foster-parent's rights, it has been held that the foster-parent does not inherit on the ground that the statute impliedly provides otherwise. *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; *Schafer v. Eneu*, 54 Pa. St. 304. Cf. TIFFANY, PER-

¹¹ *Bowser v. Cravener*, 56 Pa. St. 132; *Rollins v. Atlantic City R. Co.*, 73 N. J. L. 64, 62 Atl. 929, and cases cited *infra*, note 13. *Contra*, *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632. Where possession of land under the deed must be shown there it may be argued that conclusions therefrom are not hearsay. In *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525, no question of land or inheritance was involved, but mere pedigree.

¹² *Ardoin v. Cobb*, 136 S. W. 271 (Tex., Civ. App.). See *Wilson v. Braden*, 56 W. Va. 372, 375, 49 S. E. 409, 410. The two were confused in *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135, and *Fulkerson v. Holmes*, 117 U. S. 389, 6 Sup. Ct. 780. The court in rejecting the evidence did not take notice of the authority of a document in *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174.

¹³ *Horgan v. Town Council of Jamestown*, 32 R. I. 528, 80 Atl. 271; *Sparhawk v. Bullard*, 1 Metc. (Mass.) 95. Some cases admit this as evidence of the ancient reputation as to the boundary. *Village of Oxford v. Willoughby*, 181 N. Y. 155, 73 N. E. 677; *Dobson v. Finley*, 8 Jones L. (N. C.) 495.

¹⁴ *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333; *Burns v. United States*, 160 Fed. 631.

¹⁵ *Pierce v. Schram*, 53 S. W. 716 (Tex. Civ. App.).

¹⁶ Other instances of hearsay in connection with land are found in *King v. Little*, 1 Cush. (Mass.) 436; *Coleman v. Bruch*, 132 N. Y. App. Div. 716, 117 N. Y. Supp. 582. In *Hamerslag v. Duryea*, 58 N. Y. App. Div. 288, 68 N. Y. Supp. 1061, statements of acts were used to prove adverse possession. In Massachusetts and Maine such hearsay is sufficient evidence of a pauper's residence to charge a town with his support. *Inhabitants of Ward v. Inhabitants of Oxford*, 8 Pick. (Mass.) 476; *Inhabitants of Oldtown v. Inhabitants of Shapleigh*, 33 Me. 278.

SONS AND DOMESTIC RELATIONS, 2 ed., § 114. But see *Humphries v. Davis*, 100 Ind. 274, 275. The correctness of such a construction is not called into question here, as the statute in the principal case does not expressly provide anything about inheritance. Some courts hold that each father should inherit the property which had been acquired from himself. Cf. *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008; *Humphries v. Davis*, 100 Ind. 274. It is difficult to see how, in the absence of express legislation, such a rule can be supported. See *Reinders v. Koppelman*, 68 Mo. 482, 500. It may be argued that, since by adoption the child does not lose its right to take from the natural father, there should be complete mutuality of inheritance. But this does not necessarily follow; for the natural parent is *sui juris* and he voluntarily elects to sever the legal relation of father and child. See *In re Namanu*, 3 Hawaii 484, 485; *Humphries v. Davis*, *supra*, 283. Furthermore, in the adoption statutes the legislative purpose is to benefit unfortunate children and not their parents. *Wagner v. Varner*, 50 Ia. 532. See *Parsons v. Parsons*, 101 Wis. 76, 80, 77 N. W. 147, 148. Since the wording of the statute in the principal case is so comprehensive it would not seem unreasonable to hold that the legislature intended to create all the incidents of the common-law relation, including the right to inherit.

AGENCY — NATURE AND INCIDENTS OF THE RELATION — KNOWLEDGE OF AGENT: WHEN IMPUTED TO PRINCIPAL. — The plaintiff insured with the defendant company a horse which another company had refused to renew insurance upon because of a deformity. These facts if unknown to the defendant were sufficient to avoid the policy, but their agent had acquired knowledge of them before entering the company's employ. The horse died and the plaintiff brought suit on the policy. *Held*, that the plaintiff cannot recover. *Taylor v. Yorkshire Ins. Co.*, [1913] 1 I. R. 1.

Knowledge acquired by an agent in the very transaction for which he is employed is imputed to the principal. *Bawden v. London, etc. Assurance Co.*, [1892] 2 Q. B. 534; *Suit v. Woodhall*, 113 Mass. 391. It was early attempted to confine the doctrine to this case. See *Warrick v. Warrick*, 3 Atk. 291, 294. But this restriction has not been followed. See *The Distilled Spirits*, 11 Wall. (U. S.) 356, 366. Many courts, however, hold with the principal case that to bind the principal, the knowledge must have been obtained in the course and scope of the agent's employment. *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557; *Union National Bank v. German Ins. Co.*, 71 Fed. 473. They argue that only here are the agent and principal legally identical. See *Houseman v. Girard, etc. Association*, 81 Pa. St. 256, 262. But there seems to be no logical distinction between knowledge acquired in and knowledge recalled during the agency. Hence knowledge, whenever acquired, which is material to the agency and clearly before the mind of an agent acting in the course and scope of the employment should be held the knowledge of the principal for the purpose of that particular transaction. *Lebanon Savings Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10 N. W. 381. But cf. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552.

BANKS AND BANKING — DEPOSITS — JOINT TENANCIES. — The savings bank account of the intestate had been changed by him before his death into a joint account in the names of himself and his wife, the deposit book being kept in their joint possession. The administrator sued to recover the amount of the deposit at the time of the death of the intestate from the wife who had subsequently withdrawn it. *Held*, that the administrator may recover. *Staples v. Berry*, 85 Atl. 303 (Me.).

A creditor and his debtor may change by novation an obligation to the cred-

itor alone into a joint indebtedness to the original creditor and another party. *Armsby v. Farnam*, 33 Mass. 318. Such would presumably be the effect of the arrangement in the principal case, since the bank thereby assumed a joint liability to the intestate and his wife. Cases treating similar agreements as the mere creation by the original depositor of an agency to draw, revocable by his death, may usually be distinguished because of special facts which negative any intent to substitute a joint tenancy in the debt. *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626; *Gorman v. Gorman*, 87 Md. 338, 39 Atl. 1038; *Norway Savings Bank v. Merriam*, 88 Me. 146, 33 Atl. 840. The survivor of joint creditors, by analogy to joint tenancies in realty, becomes the sole legal owner of the chose in action. *Hedderley v. Downs*, 31 Minn. 183, 17 N. W. 274; *Sessions v. Peay*, 19 Ark. 267. Hence the right of the personal representative of the deceased in the principal case to compel the survivor to account is equitable and could rest only on some contractual or fiduciary obligation to the other joint tenant. *Clements v. Hall*, 2 De G. & J. 173. See *Freeman v. Scofield*, 16 N. J. Eq. 28, 29. Any presumption of a resulting trust because of the consideration moving from the intestate is rebutted by the relationship of husband and wife. *Stevens v. Stevens*, 70 Me. 92; *Edgerly v. Edgerly*, 112 Mass. 175. And the intent of the settlor, evidenced by the entry, coupled with the joint possession of the pass book, seems to constitute an executed gift of a joint right in the debt, with the usual incident of survivorship. See *Whalen v. Milholland*, 89 Md. 199, 43 Atl. 45. Cf. *Bonnette v. Molloy*, 138 N. Y. Supp. 67.

CONFLICT OF LAWS — MARRIAGE — VALIDITY OF FOREIGN MARRIAGE. — An Illinois statute prohibited remarriage of any divorced person within one year after the decree was rendered, and declared that a marriage so contracted should be held absolutely void. The defendant and decedent, citizens of Illinois, were married in Missouri within a year after the former had obtained a divorce in Illinois. *Held*, that the marriage is invalid. *Wilson v. Cook*, 100 N. E. 222 (Ill.). See NOTES, p. 535.

CONFLICT OF LAWS — MARRIAGE — VALIDITY OF FOREIGN MARRIAGE. — A Colorado statute prohibited remarriage of any divorced person within one year after the decree was rendered, and declared that within that period the court could reopen the decree for cause. Another section of the code provided that a marriage valid where contracted was valid in the courts of this state. The plaintiff and defendant, citizens of Colorado, were married in New Mexico within a year after the former had obtained a divorce in Colorado. *Held*, that the marriage is valid. *Griswold v. Griswold*, 129 Pac. 560 (Col.). See NOTES, p. 536.

CONSTITUTIONAL LAW — IMPAIRMENT OF THE OBLIGATION OF CONTRACT — RIGHT OF PURCHASER AT MORTGAGE FORECLOSURE SALE TO RAISE THE QUESTION. — After land had been mortgaged, a statute was passed extending to assignees of the mortgagor the right of redemption after foreclosure sale. On a bill by such an assignee to redeem from one who purchased at a sale after the statute, the purchaser objected to the statute as impairing the obligations of the mortgage contract. *Held*, that he cannot raise the question. *Cowley v. Shields*, 60 So. 267 (Ala.).

Statutes altering the conditions affecting redemption after foreclosure sales are generally held unconstitutional as applied to prior mortgages. *Paris v. Nordburg*, 6 Kan. App. 260, 51 Pac. 799; *Hollister v. Donahoe*, 11 S. D. 497, 78 N. W. 959. A few cases regard these statutes as going only to the remedy, and consequently not within the constitutional prohibition. *Anderson v. Anderson*, 129 Ind. 573, 29 N. E. 35; *Butler v. Palmer*, 1 Hill (N. Y.) 324. The Supreme Court has held in favor of the general view, and has also settled

the question as to who can attack the constitutionality. The mortgagee himself may do so in the foreclosure proceedings, for it is his own contract that is affected. *Bronson v. Kinzie*, 1 How. (U. S.) 311. And if he buys at the foreclosure sale, paying less than the mortgage debt, he retains sufficient of his character of mortgagee to enable him to raise the constitutional question. *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042. But a stranger who purchases does so under conditions existing at the time of the sale, and cannot object to a statute as impairing the obligations of a contract to which he was not a party. *Hooker v. Burr*, 194 U. S. 415, 24 Sup. Ct. 706, overruling *Howard v. Bugbee*, 24 How. (U. S.) 461. And where the mortgagee himself buys, paying as much as the mortgage debt, he stands no better than any other purchaser. *Connecticut Mutual Life Ins. Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236. He may protect himself by raising the question in the foreclosure proceedings. *Bronson v. Kinzie*, *supra*. But it seems proper to deny the purchaser the right.

CONSTITUTIONAL LAW — POWERS OF LEGISLATURE — TAXATION: VALIDITY OF STATUTE EFFECTIVE ON PASSAGE OF CONSTITUTIONAL AMENDMENT. — A state constitution provided that all persons should be rendered liable to a license tax except those engaged in mining pursuits. A statute was passed providing for a tax on the business of mining oil, but expressly providing that the statute was not to be effective until an amendment making it constitutional was passed. The amendment was passed without mentioning the statute. *Held*, that the statute is of no effect. *Etchison Drilling Co. v. Flournoy*, 59 So. 867 (La.).

The mere fact that a statute is to become effective upon a contingency will not make it invalid. *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Locke's Appeal*, 72 Pa. St. 491. The court in the principal case recognizes this rule but limits it to cases where the legislature could have enacted the statute unconditionally at the time of its passage, and reasons that here the legislature had absolutely no power to act on this matter. But state constitutions are usually held to be limitations on the power of the legislature. In this case the prohibition at the time of the passage of the act was that no taxes should be levied on mining. And it is submitted that the courts should not imply into a limitation on a coördinate governing body, the additional restriction that no statute dealing with the taxing of mining should be passed. A statute is only unconstitutional, therefore, if it commands taxes to be levied in violation of the express prohibition. But the condition on the statute in the principal case makes it impossible that taxes should be so levied; for the statute is not effective until the levy is made constitutional. *Pratt v. Allen*, 13 Conn. 113; *Galveston, B. & C. N. G. Ry. Co. v. Gross*, 47 Tex. 428. But *cf. Northern Pacific Ry. Co. v. Washington ex rel. Atkinson*, 222 U. S. 370, 32 Sup. Ct. 160. In substance it is clear that no taxpayer at the moment he is taxed will ever under any contingency be able to object that such taxation is at that time beyond the power of the legislature. It might be argued, however, that such legislation infringes upon the sovereign power of the people to amend the constitution. Assuming that such an infringement is unconstitutional, this does not seem to be an infringement. The fact that a statute may become effective is no more a consideration to hamper the free amending power than the possibility that similar statutes may be passed after the amendment.

CORPORATIONS — STOCKHOLDERS: RIGHTS INCIDENT TO MEMBERSHIP — RIGHT OF MINORITY STOCKHOLDER TO RESTRAIN TRANSFER OF CONTROL OF STOCK FROM ONE COMPETITOR TO ANOTHER. — Minority stockholders of a railroad company were granted a temporary injunction restraining the sale of a majority of the stock from one of its competitors to another under an agreement in violation of the Sherman Anti-Trust Act. *Held*, that the injunction

should be dissolved. *Delavan v. New York, New Haven & Hartford R. Co.*, 139 N. Y. Supp. 17 (Sup. Ct., App. Div.).

By the better construction, the Sherman Anti-Trust Act gives no one but the government the right to enjoin its violation. See 26 HARV. L. REV. 179. Stockholders of either the buying or selling corporation could have enjoined the conveyance as an illegal *ultra vires* transaction. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577. See 20 HARV. L. REV. 495. But the corporation of the plaintiffs was doing nothing illegal. It is also true that control of a corporation through ownership of its stock cannot be exercised at the corporation's expense. *Wheeler v. Abilene National Bank Building Co.*, 159 Fed. 391. See 22 HARV. L. REV. 591. If the resulting injury is directly towards the corporation, the shareholder cannot ordinarily sue. *Niles v. New York Central & H. R. R. Co.*, 176 N. Y. 119, 68 N. E. 142. See 22 HARV. L. REV. 594. But where his attempt to obtain from the majority the right to sue in the corporate name would be obviously futile, he may sue on behalf of the corporation in his own name as in the principal case. 4 THOMPSON, CORPORATIONS, 2 ed., § 4552. The sale by the majority stockholders of controlling stock to a competing corporation will be enjoined. *Dunbar v. American Tel. & Tel. Co.*, 224 Ill. 9, 79 N. E. 423. But a transfer from a competing corporation to one that is not competing will not be enjoined. *Hunnewell v. New York Central & H. R. R. Co.*, 196 Fed. 543. And where, as in the principal case, the transfer is from one competing corporation to another and there is no indication of injury resulting, there seems no basis for an injunction. See 13 COL. L. REV. 154.

CORPORATIONS — ULTRA VIRES CONTRACTS: RIGHTS AND LIABILITIES OF PARTIES — CONSTRUCTIVE NOTICE OF CHARTER. — A corporation issued its shares of stock below par and marked them "fully paid-up." The defendant bought them innocently from a shareholder. The articles of association showed this stock to have been issued below par. The liquidator of the corporation now sues for the balance due on the stock. *Held*, that the plaintiff is estopped, as the defendant did not have constructive notice of the articles of association. *In re Victoria Silicate Brick Co., Ltd.*, [1912] Vict. L. R. 442. See NOTES, p. 540.

CORPORATIONS — ULTRA VIRES CONTRACTS: RIGHT AND LIABILITIES OF PARTIES — PERSONAL LIABILITY OF AGENT OF CORPORATION. — The defendant was the agent of a foreign corporation which had failed to comply with the registry laws of the state. Registration was a condition precedent to the right to do business in the state. The defendant knowing these facts made a contract in behalf of the corporation with the plaintiff, who did not know them. By the law of the state the corporation was not liable on the contract. *Held*, that the defendant is liable. *Raff v. Isman*, (Pa., Sup. Ct.). See NOTES, p. 542.

CRIMINAL LAW — STATUTORY OFFENSES — LIABILITY OF AGENT OF PURCHASER IN ILLEGAL LIQUOR SALE. — The defendant acted as a messenger for the buyer in the purchase of liquors, making no profit thereon himself. A statute made the sale of liquor illegal. *Held*, that the defendant is not guilty under the statute. *Simpson v. Commonwealth*, 152 S. W. 255 (Ky.); *State v. Davis*, Ont. Wkly. R. 412.

A purchaser, though admittedly a party to a sale, is not liable under statutes forbidding the sale of liquor. *Commonwealth v. Willard*, 22 Pick. (Mass.) 476; *State v. Rand*, 51 N. H. 361. Various reasons are given for such holding. One ground relied on is that the offense is of a comparatively insignificant character. See *Commonwealth v. Willard*, *supra*, 478. Another reason advanced is that generally the seller can be convicted only by the evidence of the buyer. See *Harney v. State*, 8 Lea (Tenn.) 113, 117. Other decisions, however, rely on stat-

utory interpretation, holding that the statute by naming the seller impliedly excludes the buyer. *State v. Rand*, *supra*. *Contra*, *State v. Bonner*, 2 Head (Tenn.) 135, overruled by *Harney v. State*, *supra*. Although this ground of interpretation seems insufficient, the resulting construction is reasonable, since the purpose of the statute is principally to protect people against an inherent weakness, and not to punish for yielding to this weakness. This reason does not apply to the particular facts of the principal case, as the defendant was only the buyer's agent. However, there is nothing in the words of the statute to justify the court in so interpreting it as to excuse the purchaser when buying for himself, and hold him liable when buying for others, and hence a refusal to depart from the general rule seems proper. The great weight of authority is in accord with the principal case. *Evans v. State*, 55 Tex. Cr. 450, 117 S. W. 167; *Anderson v. State*, 32 Fla. 242, 13 So. 435. A few recent cases, however, have held the contrary view. *Buchanan v. State*, 4 Okla. Cr. 645, 112 Pac. 32; *State v. McFadden*, 151 Mo. App. 479, 132 S. W. 267.

DEATH BY WRONGFUL ACT — NATURE OF DAMAGES RECOVERABLE UNDER FEDERAL STATUTE. — In an action by the intestate's widow under the federal Employers' Liability Act of 1908 to recover damages for the wrongful death of the intestate, the court instructed that the jury could consider the value of the care and advice of the husband. *Held*, that the instruction is erroneous. *Michigan Central R. Co. v. Vreeland*, 226 U. S. 59, 33 Sup. Ct. 192.

The statute in question is substantially the same as Lord Campbell's Act, which has been interpreted as allowing merely pecuniary damages as distinguished from damages for mental suffering and grief. *STAT. 9 & 10 VICT. c. 93*; *Blake v. Midland Ry.*, 18 Q. B. 93. Similar state statutes in this country have likewise been so interpreted. *Howey v. New England Navigation Co.*, 83 Conn. 278, 76 Atl. 469; *Glawson v. Southern Bell Tel. & Tel. Co.*, 9 Ga. App. 450, 71 S. E. 747. See *TIFFANY, DEATH BY WRONGFUL ACT*, § 154. *Contra*, *Norfolk & Western Ry. v. Cheatwood's Adm'r*, 103 Va. 356, 49 S. E. 489. As an original question, this limited construction seems questionable. The statement in the principal case that it is impossible to set a pecuniary valuation on loss of society and companionship is disproved by the granting of such damages in cases of alienation of affections and criminal conversation. *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792; *Prettyman v. Williamson*, 1 Penn. (Del.) 224, 39 Atl. 731. Parasitic damages in accident cases also show that damages for mental suffering and injured feelings may be estimated. *Warren v. Boston & Maine R.*, 163 Mass. 484, 40 N. E. 895; *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297, 36 Atl. 100. See *BURDICK, TORTS*, 2 ed., 100. But the danger of undue prejudice in the jury and the practical difficulty in ascertaining such damages make the wisdom of allowing them doubtful. It seems reasonable therefore in a cause of action not recognized at common law to require a clear legislative intention to allow them.

DIVORCE — ALIMONY — POWER TO MODIFY AWARD IN GROSS. — In an action for divorce the court awarded the plaintiff a gross sum as alimony, but at the defendant's request granted an extension of the time for the payment of part of it. The plaintiff meanwhile remarried, and the defendant sought to be relieved from his obligation to pay the sum still due. The trial court refused to grant his petition. *Held*, that it did not abuse its discretion in so doing. *Narregang v. Narregang*, 139 N. W. 341 (S. D.).

Equitable decrees will not usually be modified after the expiration of the term during which they are rendered. *Hurd v. Goodrich*, 59 Ill. 450; *Snyder v. Middle States Loan, etc. Co.*, 52 W. Va. 655, 44 S. E. 250. An award of an annual sum as alimony, however, being based on the wife's right of continuous sup-

port, is by the better view not a final adjudication but subject to subsequent revision. *Olney v. Watts*, 43 Oh. St. 499. See 26 HARV. L. REV. 441. *Contra, Sampson v. Sampson*, 16 R. I. 456, 16 Atl. 711. An award of alimony in gross, on the other hand, changes the duty of continuous support into an obligation to pay immediately a fixed sum of money, and would seem to be a final settlement of the rights of the parties. *Plassee v. Plassee*, 47 Ill. 290; *Petersine v. Thomas*, 28 Oh. St. 596. Statutes allowing the modification of alimony decrees are, however, sometimes interpreted as applying to awards in gross. *Buckminster v. Buckminster*, 38 Vt. 248; *Hopkins v. Hopkins*, 40 Wis. 462. Yet it seems clear that when the decree has been carried out there is no longer anything to modify, and since it may generally be enforced by execution without the further aid of equity, the fact that it is still unperformed should be immaterial. Therefore such statutes should be held to have no application to award in gross. *Guess v. Smith*, 100 Miss. 457, 56 So. 166. Cf. *Krauss v. Krauss*, 127 N. Y. App. Div. 740, 111 N. Y. Supp. 788. Since the award in the principal case was virtually one in gross, it would seem that the statute gave the trial court no discretion which it could abuse. See S. D. CIV. CODE, § 92.

EQUITY — JURISDICTION — ACTION BY MUNICIPALITY AGAINST TAX COLLECTOR FOR TAXES COLLECTED. — The plaintiff township filed a bill in equity praying that the defendant, a tax collector, be ordered to account for taxes collected and to pay over money still due. *Held*, that equity has no jurisdiction. *Franklin v. Crane*, 85 Atl. 408 (N. J.).

Agents to collect are generally held to be in a fiduciary relation. *Stoll v. King*, 8 How. Pr. (N. Y.) 298; *In re Gent*, 40 Ch. D. 190. A tax collector would clearly seem to be a fiduciary. *Hill v. Fleming*, 128 Ky. 201, 107 S. W. 764. He is treated as a trustee in that if he uses the money he is guilty of embezzlement. *Commonwealth v. Fischer*, 113 Ky. 491, 68 S. W. 855. Moreover, he is not allowed a plea of set-off. *City of Waterbury v. Lawlor*, 51 Conn. 171. And, if the fund is destroyed in spite of due care, he should be absolved from liability. *Ross v. Hatch*, 5 Ia. 149. The jurisdictions holding a tax collector absolutely liable for money collected proceed on grounds of public policy. *United States v. Prescott*, 3 How. (U. S.) 578. They do not consider such an officer to be a mere debtor. *United States v. Thomas*, 15 Wall. (U. S.) 337. The decision in the principal case may be merely a matter of procedure since the township might have sued in *indebitatus assumpsit*. *Allen v. Impett*, 8 Taunt. 263. But see *Bartlett v. Dimond*, 14 M. & W. 49, 56. But it seems anomalous for equity to refuse to exercise its exclusive jurisdiction, because the law also gives a remedy.

EVIDENCE — DOCUMENTS — RECITALS IN ANCIENT DEEDS. — The plaintiff claimed land under a conveyance from an assignee in bankruptcy. The plaintiff offered as the principal evidence of the transfer of title to the assignee a recital of this in the assignee's deed, which was over thirty years old but under which there had been no possession of the land in question. *Held*, that the recitals are admissible in evidence. *Lacey v. Southern Mineral Land Co.*, 60 So. 283 (Ala.). See NOTES, p. 544.

EVIDENCE — RES GESTÆ — VIOLATION OF RULES OF RAILWAY COMPANY AS EVIDENCE OF NEGLIGENCE. — In an action against a street railway company for the death of the plaintiff's intestate, who was killed while getting on to a moving car, evidence of the rules of the company regulating the conduct of motormen was excluded. *Held*, that the exclusion is not error. *Hoffman v. Cedar Rapids & M. C. Ry. Co.*, 139 N. W. 165 (Ia.).

For a discussion of the principles involved, see 17 HARV. L. REV. 421.

HUSBAND AND WIFE — CONTRACTS BETWEEN HUSBAND AND WIFE — EFFECT OF ADULTERY OF WIFE UPON HER RIGHTS UNDER SEPARATION AGREEMENT. — By the terms of a separation agreement the defendant promised to pay to the plaintiff a certain sum monthly for her support. There was no express condition that she remain chaste. The plaintiff thereafter was guilty of adultery, and later sued for an installment under the agreement. *Held*, that the plaintiff cannot recover. *Roth v. Roth*, 138 N. Y. Supp. 573 (Ct. Gen. Sess., Oneida County).

A wife loses her common-law right to support when she is guilty of adultery. *Gill v. Read*, 5 R. I. 343; *Hunter v. Boucher*, 3 Pick. (Mass.) 289. Therefore while failure to support a wife would ordinarily be criminal, the wife's adultery will afford a defense. *State v. Schweitzer*, 57 Conn. 532, 18 Atl. 787; *People v. Brady*, 34 N. Y. Supp. 1118. The guilty wife cannot maintain a suit for separation and an allowance. *Doe v. Roe*, 23 Hun (N. Y.) 19; *Hawkins v. Hawkins*, 103 N. Y. 409. And where a separate allowance has been decreed subsequent guilt will prevent her from enforcing the obligation. *Severn v. Severn*, 14 Grant Ch. (U. C.) 150. Since the wife's right to support is based on the marriage relation, it would seem to be a sound public policy to refuse to enforce it when she has been guilty of such a serious offense against the relation. But where the right to support depends entirely on a contractual obligation, and adultery is not expressly made a condition of forfeiture in the separation agreement, to imply such a condition would not necessarily carry out the intention of the parties. *Charlesworth v. Holt*, L. R. 9 Exch. 38. Nor would public policy seem to demand a forfeiture of the wife's contractual rights. *Fearon v. Earl of Aylesford*, 14 Q. B. D. 792. The authorities seem to be uniformly opposed to the holding of the principal case. *Dixon v. Dixon*, 23 N. J. Eq. 316; *Sweet v. Sweet*, [1895] 1 Q. B. 12. And the wife has not been deprived of her contract rights even when there has been a subsequent divorce because of her adultery. *Charlesworth v. Holt*, *supra*.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — COMPENSATION OF DETECTIVE BUREAU TO DEPEND UPON SUCCESS. — The plaintiff agency was employed to detect larcenies in the defendant's factory. A regular monthly sum was to be paid for their services with an additional compensation if the thieves were discovered and brought before the defendants with the goods in their possession. The plaintiff sued for services under the contract. *Held*, that the plaintiff cannot recover. *Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.*, 138 N. W. 624 (Wis.).

The contract is held void as tending to perjury. Analogous cases of contracts to procure evidence have sometimes been declared illegal, when compensation depended on the satisfactory nature of the testimony produced, or the successful determination of the suit. *Stanley v. Jones*, 7 Bing. 369; *Gillett v. Board of Supervisors of Logan County*, 67 Ill. 256. More closely analogous, however, are reward contracts. These are not illegal even where the reward is for arrest and conviction. See *Furman v. Parke*, 21 N. J. L. 310, 313; *Loring v. City of Boston*, 48 Mass. 409, 411. Public officers as well as private individuals if not already under duty to accomplish the result desired may recover rewards. *Morrell v. Quarles*, 35 Ala. 544; *England v. Davidson*, 3 P. & D. 594. So may one who employs detectives. *Wilmoth v. Hensel*, 151 Pa. St. 200, 25 Atl. 86. It is true that the present contract is a secret one. Hence its performance will not be subject to public scrutiny, and it does not tend, by arousing the public, to deter criminals from future offenses. But this seems of little weight, nor does the inducement to commit perjury appear to be greater in a promise to pay for the detection of any crime that may be committed against the promisor than in a reward offered for the detection of a particular crime already com-

mitted. It would seem that the policy of discouraging crimes should counteract a tendency to perjury, unless the inducement offered is out of proportion to the legitimate labor required.

INTERSTATE COMMERCE — CONTROL BY STATES — RESERVATION BY STATE OF RIGHT TO FIX INTERSTATE RATES AS CONDITION OF INCORPORATION OR LEASE. — A state-owned interstate railroad was leased by a statute incorporating the lessee and providing that all rates charged should conform to the schedules fixed by a state commission. The lessee filed rates within the maximum fixed by the Interstate Commerce Commission but higher than the maximum of the state commission, though this maximum was reasonable. *Held*, that the state cannot compel the lessee to reduce the rates. *State v. Western & Atlantic R. Co.*, 76 S. E. 577 (Ga.). See NOTES, p. 539.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — EFFECT OF INTENT OF PERSON TO WHOM GOODS ARE SHIPPED. — The Sabine Company shipped lumber by rail from Ruliff, Texas, to Sabine, Texas, and indorsed over the bills of lading to one who had contracted to purchase. The purchaser had the lumber switched to the docks at Sabine, where it remained for thirty days until the arrival of a ship, chartered by the purchaser, on which it was loaded and carried abroad. At the time of the shipment by the Sabine Company the purchaser intended the lumber to go abroad but had not decided upon the particular destination. The Sabine Company did not know that the lumber was to go beyond Sabine. *Held*, that the shipment from Ruliff to Sabine is part of a foreign shipment and is not subject to state rate regulations. *Texas & New Orleans R. Co. v. Sabine Tram Co.*, 33 Sup. Ct. 229.

A landmark in the development of the law as to the carriage of goods having an ultimate destination beyond a state was the decision that a steamer operating on the navigable waters of the United States but wholly within a state, could be regulated by Congress if it carried goods to be transshipped beyond the state. *The Daniel Ball*, 10 Wall. (U. S.) 557. On the same principle the business of an intrastate railroad handling such goods is held not liable to state taxation. *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958. Further it has been decided that when goods are shipped under a bill of lading for an intrastate trip the regulation of the carriage is for Congress and not the state if the shipper intended to transship abroad, though he had not decided on a particular destination. *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 31 Sup. Ct. 279; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 653. But *cf. General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475. In holding that the character of a shipment may be determined by the intent of the purchaser, the court takes a step in advance, and one not in accord with the view expressed in a slightly earlier case. *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360. That case, however, is possibly distinguishable on its facts, as the transshipment was made not by the original purchaser but by a person who purchased the goods from him.

INTOXICATING LIQUORS — WILSON ACT — APPLICABILITY TO FOREIGN COMMERCE. — A judgment was obtained against the plaintiff in a state court of last resort for the amount of a license tax imposed on all liquor dealers as a police regulation by the state legislature under the authority of the Wilson Act. The plaintiff, who dealt only in foreign liquors, appealed on the ground that the Wilson Act applied only to interstate commerce, and that the tax was therefore imposed in violation of the provisions of the federal Constitution forbidding states to lay imposts, and giving to Congress the power to regulate

foreign commerce. *Held*, that the Wilson Act applies to foreign as well as to interstate commerce. *De Bary & Co. v. Louisiana*, 227 U. S. 108, 33 Sup. Ct. 239. See NOTES, p. 533.

MANDAMUS — PARTIES — RIGHT OF DE FACTO OFFICER TO COMPEL PAYMENT OF SALARY. — In a mandamus proceeding to compel payment of a public officer's salary, the defendant alleged that the relator was not properly commissioned in office. *Held*, that such a defense cannot be set up. *State ex rel. Frank v. Goben*, 152 S. W. 93 (Mo.).

Because of the necessity of confidence in public acts, and to protect the rights of parties relying on official acts, a *de facto* title to a public office may not be collaterally attacked. *State v. Carroll*, 38 Conn. 449; *People ex rel. Hoffman v. Hecht*, 105 Cal. 621, 38 Pac. 941. But this doctrine is in no wise remedial to the officer himself. See 20 HARV. L. REV. 458. Only a public officer lawfully appointed or elected, and installed, has a right to compensation for his services. *Wittmer v. City of New York*, 50 N. Y. App. Div. 482, 64 N. Y. Supp. 170; *City of Philadelphia v. Given*, 60 Pa. St. 136. But cf. *Cousins v. City of Manchester*, 67 N. H. 229, 38 Atl. 724. Thus in an ordinary action of debt for his salary, the plaintiff's title to office may be questioned. *City of Philadelphia v. Given*, *supra*; *Sheridan v. City of St. Louis*, 183 Mo. 25, 81 S. W. 1082. Also in mandamus proceeding, contrary to the principal case, lack of *de jure* title may be set up. *State ex rel. Dudley v. Daggart*, 28 Wash. 1, 68 Pac. 340; *Williams v. Clayton*, 6 Utah 86, 21 Pac. 398. When, however, a third party claiming to be a *de jure* officer brings mandamus for his salary, the court by allowing a defense refuses to question the title of the *de facto* officer, for his title can then be justly adjudicated only in a *quo warranto* proceeding to which he is a party. *State ex rel. Vail v. Draper*, 48 Mo. 213; *State ex rel. Simmons v. John*, 81 Mo. 13. The principal case confuses a suit brought by the *de facto* officer himself with such cases, and by refusing without reason to go into the question of the plaintiff's title to the office, allows a recovery.

MINES AND MINERALS — ADVERSE POSSESSION WHERE SEVERANCE OF SURFACE. — The defendant was owner of the surface of the soil through a deed reserving the minerals to the grantor. The plaintiff was grantee of the gypsum. The defendant mined the gypsum from time to time for more than the statutory period of limitations. *Held*, that an injunction will be granted to restrain further removal. *White v. Miller*, 78 N. Y. Misc. 428 (Sup. Ct.).

The right to the surface of land is capable of severance from the right to the underlying mineral deposits which thereby form a distinct corporeal hereditament. *Hartwell v. Camman*, 10 N. J. Eq. 128; *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035. In case of such severance ordinary possession of the surface for the statutory period does not operate as adverse possession of the minerals. *French v. Lansing*, 73 N. Y. Misc. 80, 132 N. Y. Supp. 523; *Armstrong v. Caldwell*, 53 Pa. St. 284. Nor are occasional acts of mining and carrying off the minerals sufficient. *Hooper v. Bankhead*, 171 Ala. 626, 54 So. 549; *French v. Lansing*, *supra*. The possession, to be sufficient, must include a continuous operation of the mines in accordance with the nature of the business. *Gordon v. Park*, 219 Mo. 600, 117 S. W. 1163. See *Armstrong v. Caldwell*, *supra*, 288. Cf. *House v. Palmer*, 9 Ga. 497. The acts must likewise be open and notorious. *Dartmouth v. Spittle*, 19 Wkly. Rep. 444. See *Gordon v. Park*, *supra*. In general the extent of acquisition by adverse possession without color of title depends on the actual possession of the adverse claimant, which in the case of mines is confined practically to the part being worked. But where the claim is under color of title it is to the limits of that title, even though only part of the land is actually occupied. *Jackson v. Olitz*, 8 Wend. (N. Y.) 440. This distinction recognized in general in regard to land is not

clearly drawn in the above cases, but there seems no reason for not applying it. See *WHITE, MINES AND MINING*, § 433. In the principal case it is not certain that the acts of adverse possession were continuous.

QUASI-CONTRACTS — RECOVERY FOR BENEFITS CONFERRED WITHOUT CONTRACT — RIGHT OF SUBCONTRACTOR WHEN ORIGINAL CONTRACTOR'S CLAIM IS UNENFORCEABLE. — A railroad company contracted to have its railroad built by a foreign construction company. The construction company had the work done by local subcontractors. The railroad company defeated the suit of the construction company on the contract on the ground that the construction company had not complied with a statute providing, under penalty of fine, that foreign corporations should not transact business in the state until certain papers had been filed with the secretary of state. One of the subcontractors thereafter sued the railroad company for the value of his work in constructing the railroad. *Held*, that the plaintiff cannot recover. *Alexander v. Alabama Western R. Co.*, 60 So. 295 (Ala.).

The acceptance from a subcontractor of improvements expressly contracted for by a landowner clearly affords no basis from which to imply in fact a promise on his part to pay the subcontractor. *Farquhar v. Brown*, 132 Mass. 340; *Cleaves v. Stockwell*, 33 Me. 341. And if the landowner must pay the contractor there is no unjust enrichment on which to found a quasi-contractual recovery. *Peers v. Board of Education*, 72 Ill. 508; *Fender v. Kelly*, 58 Ill. App. 283. Accordingly if the effect of the statute is merely to deny a suit on the contract by the foreign corporation in the state courts the plaintiff here could not recover since the construction company could still sue the railroad company in the federal courts. *Groton Bridge & Mfg. Co. v. American Bridge Co.*, 151 Fed. 871; *Dunlop v. Mercer*, 156 Fed. 545. Though there is language in the principal case which might indicate that the court takes this view of the statute, it is not certain that a departure is intended from the view previously taken that recovery in any court is made impossible. *Dudley v. Collier*, 87 Ala. 431, 6 So. 304; *Chattanooga National Building & Loan Association v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630. And the court would probably deny the construction company a quasi-contractual recovery on the forbidden transaction. See *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275, 279, 7 So. 200, 201; *Western Union Tel. Co. v. Young*, 138 Ala. 240, 243, 36 So. 374, 375. Cf. *Grand Lodge of Alabama v. Waddill*, 36 Ala. 313; *Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Ry. Co.*, 204 Pa. 22, 53 Atl. 533. But see *Dunlop v. Mercer*, 156 Fed. 545, 553, 554. But nevertheless there still seems no basis for quasi-contractual recovery by the subcontractor, for he did the work solely on the credit of the construction company. Cf. *Lauer v. Bandow*, 43 Wis. 556; *Tripp v. Hathaway*, 15 Pick. (Mass.) 47; *Quin v. Hill*, 4 Demarest (N. Y.) 69; *United States v. Pacific R.*, 120 U. S. 227, 7 Sup. Ct. 490. See *KEENER ON QUASI-CONTRACTS*, 350. If it be urged that the subcontractor relied ultimately on the railroad for his pay, still as he did not contract with the railroad company for his compensation but chose to sell his services to the construction company for the obligation of the construction company, he has no standing in court to demand a cumulative right.

SALES — IMPLIED WARRANTIES — WHOLESOMENESS OF FOOD SERVED ON DINING CAR. — The plaintiff sued for poisoning due to his eating canned asparagus in the dining car of the defendant company. The goods were of a well-known brand, had been purchased by the company of a reputable dealer, and the company could not by the exercise of the utmost care have discovered the defect. *Held*, that the plaintiff cannot recover. *Bigelow v. Maine Central R. Co.*, 85 Atl. 396 (Me.).

It may be argued that serving food as incidental to the carrier's public undertaking should impose no greater duty than that of utmost care, analogous to a carrier's liability for hidden defects in construction. *Cf. Ingalls v. Bills*, 50 Mass. 1; *Readhead v. Midland R. Co.*, L. R. 4 Q. B. 379. Similarly water companies are not absolutely liable where impure water causes disease. *Buckingham v. Plymouth Water Co.*, 142 Pa. 221, 21 Atl. 824; *Green v. Ashland Water Co.*, 101 Wis. 258, 77 N. W. 722. But a carrier should certainly be held under no less absolute a duty than is ordinarily imposed in the serving of food. There are no cases involving innkeepers, but a restaurateur has been held to absolute liability. *Doyle v. Fuerst*, 129 La. 838, 56 So. 906. A contrary Illinois decision was later distinguished on procedural grounds. *Sheffer v. Wiloughby*, 163 Ill. 518, 45 N. E. 253. See *Wiedeman v. Keller*, 171 Ill. 93, 99, 49 N. E. 210, 212. If the serving of food be regarded as a sale, the doctrines of implied warranty are applicable. Most jurisdictions make the dealer in provisions for immediate human consumption a warrantor of wholesomeness, because of the buyer's justifiable reliance on the seller's superior judgment, and the public policy in preserving health. *Divine v. McCormick*, 50 Barb. (N. Y.) 116; *Hoover v. Peters*, 18 Mich. 51. *Cf. Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481. The principal case recognizes this rule, but makes an exception in the case of canned goods on the ground that the buyer only relies on the seller to select a reputable brand and to inspect carefully. *Winsor v. Lombard*, 35 Mass. 57; *Julian v. Laubenberger*, 16 N. Y. Misc. 646, 38 N. Y. Supp. 1052. This distinction, it is submitted, wrongly disregards the public policy involved.

SALES — RIGHTS AND REMEDIES OF SELLER — REVESTING OF VENDOR'S LIEN UPON INSOLVENCY OF BUYER AFTER SALE TO BONÂ FIDE PURCHASER. — The defendant held as bailee goods subsequently sold on credit by the bailor. Before the period of credit expired the first purchaser sold on credit to a second purchaser who sold to the plaintiff, a purchaser for value. All the sales were evidenced by written contracts. The second purchaser, the plaintiff's vendor, then became insolvent. The defendant refused to deliver the goods to the plaintiff, setting up as agent of the first purchaser a lien for the unpaid purchase price. *Held*, that the plaintiff can recover the goods. *Willis v. Glenwood Cotton Mills*, 200 Fed. 301 (Dist. Ct., S. C.).

The defendant could set up whatever rights of possession the first purchaser, an unpaid vendor, had. A vendor's lien for the unpaid purchase price is not lost when at the time of the sale the goods are in the possession of a bailee unless the bailee becomes the agent of the buyer and holds possession for him. *In re Batchelder*, 2 Fed. Cas., No. 1099, 2 Lowell 245. A vendor's lien is waived by a sale on credit. *Culler v. Pope*, 13 Me. 377. See *Arnold v. Delano*, 4 Cush. (Mass.) 33. But this lien revives, if the vendor still has possession, upon the expiration of the credit or upon the insolvency of the buyer. *Owens v. Weedman*, 82 Ill. 409; *Tuthill v. Skidmore*, 1 N. Y. Supp. 445; *Arnold v. Delano, supra*; *Milliken v. Warren*, 57 Me. 46. A resale to third persons does not ordinarily affect the right of an unpaid vendor in possession, for his lien is a legal, and not a mere equitable, right. *Dixon v. Yates*, 5 B. & Ad. 313. See *Haskell v. Rice*, 11 Gray (Mass.) 240. Therefore a sub-vendee, even though a bonâ fide purchaser, is usually subject to the revival of the vendor's lien upon the insolvency of the vendee. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Hamburger v. Rodman*, 9 Daly (N. Y.) 93; *M'Ewan v. Smith*, 2 H. L. Cas. 309. The delivery to a bonâ fide sub-vendee of an order bill of lading will destroy the vendor's lien, since the bill of lading is a symbol of possession. See *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302. Facts giving rise to an estoppel may also prevent the vendor from claiming the lien. *Stoveld v. Hughes*, 14 East 308; *Fourth National Bank v. St. Louis Cotton Compress Co.*, 11 Mo.

App. 333. In spite of the contrary intimation in the principal case, a written contract of sale can hardly be a representation that the vendor will not claim a lien in case of insolvency, thereby forming the basis for an estoppel; nor is such a contract a symbol of possession. In the absence of attornment by the bailee to the second purchaser, therefore, the principal case seems erroneous.

SUBROGATION — ASSIGNMENT OF MORTGAGE TO SUBSEQUENT LESSEE ON REDEMPTION. — The assignee of a first mortgage obtained a subsequent lien on the mortgaged land. The owner of a lease intervening between the mortgage and the lien made large improvements on the land. After the acquisition of the lien he brought a bill to compel the assignee of the mortgage to receive the debt and assign the mortgage. *Held*, that a decree will be granted. *Hopkins v. Ketterer*, 85 Atl. 421 (Pa.).

A lessee may redeem and be subrogated to the rights of a prior mortgagee, when the mortgagee's rights will not be jeopardized thereby. *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Wunderle v. Ellis*, 212 Pa. 618, 62 Atl. 106. *Cf. Snook v. Zentmyer*, 91 Md. 485, 46 Atl. 1008. The lessee's equity in protecting his lease and improvements is clear. In the principal case no rights of the defendant were infringed, for he could not utilize his prior mortgage for the benefit of his lien, even where tacking is allowed, since the lien was acquired with constructive notice of the recorded lease. *Toulmin v. Steere*, 3 Meriv. 210. Subsequently the mortgagee, to enforce his lien, may compel the lessee to foreclose; but the lessee can then sell subject to the lease, thus protecting his property right. The mortgagee's former rights as a lienholder against the reversion, effective only after the original mortgage claim and the lease are taken out of the whole estate, are still preserved. The lessee, however, has no legal right to an actual assignment of the mortgage. *Hamilton v. Dobbs*, *supra*. But *cf. Twombly v. Cassidy*, 82 N. Y. 155. The equitable subrogation is adequate to protect him, for if the mortgage on the title record is marked "Paid by lessee," purchasers would take with notice of his equitable rights. And if an assignment is compelled, the assignor might perhaps be made liable on implied warranties. *Cf. Waller v. Staples*, 107 Ia. 738, 77 N. W. 570; *Ross v. Terry*, 63 N. Y. 613. It would seem, therefore, that equity should not require an actual assignment.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION — RELATION OF DEPOSITORY'S SURETY TO STATE TREASURER'S SURETY. — A bank in which the state treasurer had deposited public money failed and the bank's surety was compelled to pay the loss. The surety claimed that the loan was illegal and that it should be subrogated to the rights of the state against the treasurer's surety. *Held*, that the surety for the bank is not entitled to relief. *United States Fidelity & Guaranty Co. v. Title Guaranty & Surety Co.*, 200 Fed. 443 (Dist. Ct., D. Md.).

By the weight of authority, officials in charge of public money are absolutely liable for its loss except when caused by the act of God or a public enemy, not because they are debtors but for reasons of policy. *Tillinghast v. Merrill*, 151 N. Y. 135, 45 N. E. 375; *Rose v. Douglass Township*, 52 Kan. 451, 34 Pac. 1046; *United States v. Thomas*, 15 Wall. (U. S.) 337. Some jurisdictions make exceptions by statutory construction. *State v. Gramm*, 7 Wyo. 329, 52 Pac. 533; *City of Livingston v. Woods*, 20 Mont. 91, 49 Pac. 437. Others flatly deny the necessity for such a stringent rule and impose only the limited liability of a trustee. *Wilson v. People*, 19 Colo. 199, 34 Pac. 944; *State v. Copeland*, 96 Tenn. 296, 34 S. W. 427. In the principal case, though the state might on any view have proceeded against the treasurer's surety, it does not follow that the depository's surety succeeded to that right. Since the bank actually received the money it was clearly the primary debtor, for the misconduct of the official

had nothing to do with the bank failure. It is only fair that the relation of the sureties should be determined by the liability of their principals, for that was the measure of their assumption. Thus the surety of an assignee of a lease stands in the relation of principal to the surety of the lessee although both are answerable for the assignee's default. *Bender v. George*, 92 Pa. St. 36. Likewise the surety of a deputy sheriff who has misappropriated money received in his official capacity, has a prior liability compared with that of the surety of the sheriff. *Brinson v. Thomas*, 2 Jones Eq. (N. C.) 414. The more general surety holds a position like that of a guarantor of a bill or note, whose liability is secondary to that of all the parties on the instrument although some of them are only sureties. *Phillips v. Plato*, 42 Hun (N. Y.) 189; *Longley v. Griggs*, 10 Pick. (Mass.) 121. A further analogy is found where a public official with a general surety is required to furnish another surety for some special duty, in which case the general surety is not answerable at all for defaults in the special duty. *Columbia County v. Massie*, 31 Or. 292, 48 Pac. 694; *County Board of Education v. Bateman*, 102 N. C. 52, 8 S. E. 882; *State v. Young*, 23 Minn. 551.

TORTS—NATURE OF TORT LIABILITY IN GENERAL—LIABILITY FOR BREACH OF STATUTORY DUTY.—A statute imposed upon railroads the duty of fencing their tracks in certain cases. The defendant railroad failed to maintain its fence properly with the result that the plaintiff's cattle escaped and were lost. *Held*, that the railroad company is liable. *Stanley v. Atchison, Topeka, & Santa Fé Ry. Co.*, 127 Pac. 620 (Kan.). See NOTES, p. 531.

TRUSTS—NATURE OF TRUST RELATION—A TRUST DISTINGUISHED FROM AN EQUITABLE CHARGE.—The defendant and others, in conveying certain realty, provided in the deeds that the grantee should maintain and support the defendant for life and should reserve a room and bedroom for the defendant's use for life. The grantee mortgaged the property to the plaintiff who had knowledge of the defendant's rights. The plaintiff foreclosed the mortgage and sought to dispossess the defendant. *Held*, that the defendant may retain his possession. *Wolfe v. Croft*, 11 East. L. Rep. 532 (Nova Scotia).

The nature of the defendant's rights should be determined from the intent as apparent in the deed. *Hill v. Bishop of London*, 1 Atk. 617; *King v. Denison*, 1 Ves. & B. 260. If the instruments manifested a desire on the part of the grantors to have the defendant maintained out of part of the profits of the land, there would seem to be no difficulty in creating a trust of the whole land for this purpose. But in the principal case, in spite of the fact that the provision for maintenance is coupled with another which can only be a trust, the above intent does not appear. The grantee is intended to take beneficially, subject merely to a duty to support the defendant out of any fund at all. This is an equitable charge. *King v. Denison*, *supra*; *Loder v. Hatfield*, 71 N. Y. 92. Rather than requiring any technical words to create such a charge, the courts have gone very far in implying an intent to create them. *Harris v. Fly*, 7 Paige (N. Y.) 421; *Crawford v. Severson*, 5 Gill (Md.) 443. They may be created by deed as well as by will. See POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 1244. In the principal case the promise was made directly to the defendant. But in the ordinary case of deeds the doctrine seems in substance to permit a beneficiary to sue on a contract for his benefit. The grantee, by accepting the conveyance, impliedly promises to follow the directions and thereafter is personally liable to support the grantor, who has also an equitable lien on the land, as security for his personal claim. *Brown v. Knapp*, 79 N. Y. 136; *Loder v. Hatfield*, 71 N. Y. 92. Since the mortgagee took with notice of the defendant's rights, the court rightly held that they would not be extinguished.

VENDOR AND PURCHASER — RIGHTS AND LIABILITIES — RISK OF LOSS IN EXECUTORY SALE OF LAND. — The owner of a storehouse and lot contracted to sell the same to the defendant. A small portion of the purchase price was paid at the time of the contract and one half of the residue was to be paid several months later when a deed and purchase money mortgage were to be executed. Before the date for the conveyance and while the plaintiff by his lessee was in possession the storehouse was destroyed by fire. *Held*, that the loss falls upon the vendor in possession. *Good v. Jarrard*, 76 S. E. 698 (S. C.).

The great majority of the jurisdictions of this country, as well as England, place upon the purchaser of real estate any loss occurring between the making of a contract and its performance. The principal case is interesting in that it sets up the fact of possession as a standard, the court reasoning that the party who has possession and the rights incident to ownership should bear the risk of loss. See 9 HARV. L. REV. 106. For a defense of the prevailing rule, see 1 COL. L. REV. 1. See also 23 HARV. L. REV. 476.

WITNESSES — COMPETENCY AS TO PARTICULAR MATTERS — BASTARDIZING THE ISSUE: ADMISSIBILITY OF WIFE'S TESTIMONY TO PROVE ADULTERY. — In an action by the husband for a divorce on the ground of the wife's adultery and for the establishment of the illegitimacy of the child, letters of the wife tending to prove non-access with the husband were offered as evidence on both issues. *Held*, that the evidence is admissible to prove adultery only. *Bancroft v. Bancroft*, 85 Atl. 561 (Del. Super. Ct.).

Husband and wife are generally held incompetent to prove non-access whatever may be the form of legal proceedings and whoever may be the parties thereto. *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242. See *Chamberlain v. People*, 23 N. Y. 85, 88; 25 HARV. L. REV. 746. There is no sound basis for this rule, however, and the modern English cases show a tendency to restrict its operation. *In re Yearwood's Trusts*, 5 Ch. D. 545; *Poulett Peerage*, [1903] A. C. 395. See 3 WIGMORE, EVIDENCE, § 2064. If it is to be restricted at all, the refusal of the principal case to apply it where the child's status is not in issue seems entirely justified. See *Tioga County v. South Creek Township*, 75 Pa. St. 433, 437.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — EXTENT OF PROTECTION BY IMMUNITY STATUTE. — To an indictment for revenue frauds the defendant pleaded exemption from prosecution under the federal "Immunity Statute," providing that no person shall be prosecuted on account of any transaction concerning which he may testify under oath in any proceeding under the Interstate Commerce Act. At a grand jury investigation under this act, the defendant had produced the books of the corporation of which he was an officer. His frauds were perpetrated in the corporation business. *Held*, that a verdict directed for the government is proper. *Heike v. United States*, 227 U. S. 131, 33 Sup. Ct. 226.

Under the federal and most state constitutions, a witness cannot be compelled to give testimony incriminating himself. U. S. CONST., AMENDMENT V; N. Y. CONST., Art. 1, § 6. But when a statute gives a witness complete protection within its jurisdiction, one who could otherwise invoke the constitutional privilege cannot refuse to testify. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644. See *Counselman v. Hitchcock*, 142 U. S. 547, 585-586, 12 Sup. Ct. 195, 206. Even without such a statute, if the testimony required only remotely tends to incriminate him, he cannot refuse to testify. *Rudolph v. State*, 128 Wis. 222, 107 N. W. 466; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447. Nor can he refuse to produce the corporate books if he is an officer of the corporation. *Wilson v. United States*, 221 U. S. 361, 31 Sup. Ct. 718; *Dreier v. United States*, 221 U. S. 394, 31 Sup. Ct. 550. *Contra, Rex v. Cornelius*, 2 Str. 1210. The de-

fendant in the principal case, therefore, could clearly have been made to produce these books, even without the statute; but according to a literal interpretation of the statute he would be protected in so doing. But the purpose of the legislature in enacting the statute was not to give needless immunity to criminals, but to obtain evidence formerly unattainable. The court's interpretation that the immunity is only coextensive with the former privilege gives complete effect to the intent of Congress.

BOOK REVIEWS.

THE LAW OF QUASI CONTRACTS. By Frederic C. Woodward. Boston: Little, Brown, and Company. 1913. pp. lxi, 498.

Within recent years the subject of quasi-contracts has received an increasing amount of attention. It has been taught in more than a score of law schools, and the work of instruction and investigation has been noticeably stimulated by the excellent case-books of Professor Scott and Professor Woodruff. Law writers and teachers have generally accepted the analysis and classification first made by Professor Ames, and it is gratifying to find that not a few decisions indicate a growing disposition on the part of courts to give recognition to these general principles instead of merely relying on a precedent dealing with the particular situation.

It is twenty years since the well-known treatise of Professor Keener appeared. This pioneer book has unusual merits, and was immediately accepted as an authority. But its very merits have probably discouraged for an unduly long period any attempt to write a second book on the subject which would incorporate the results of recent decisions as well as the contributions which have been made by writers of articles on special topics in various law periodicals.

Professor Woodward's book has, therefore, the initial advantage of being a timely book. The book has, however, more substantial claims to favorable consideration. The author has confined his treatment to those obligations arising upon the receipt of a benefit the retention of which is unjust. The real problem is to ascertain to what extent this obviously vague generalization is entrenched in the law and to define its limits; and accordingly the author has wisely devoted the greater part of the book to a critical examination of the circumstances under which the benefit is received or retained. This classification and order of arrangement are conducive to precision of thought and will probably be found helpful to the student.

It is needless to state that differences of opinion will probably always continue to exist with respect to such unsettled questions as change of position as a defense and the doctrine of *Price v. Neal*.¹ It is nevertheless a service to summarize the points of strength and weakness of the several theories and to indicate the existing state of the authorities. In this task the author has succeeded admirably.

In a book dealing with a subject of such moderate compass it would have been fitting to have included a discussion of some topics to which the author has not referred. Thus, for example, there is no mention of the possibility of an interesting development in the law whereby a minor may, under some circumstances, be held in quasi-contract for non-necessaries supplied to him. A recovery in quasi-contract was allowed in *Hall v. Butterfield*.²

The author has done his work carefully and thoroughly. His book cannot

¹ 3 Burr. 1354.

² 59 N. H. 354.

fail to be of real assistance to all students of the law. A very full index and the citation of many recent cases will make it equally serviceable to the practitioner.

L. F. S.

A HISTORY OF FRENCH PRIVATE LAW. By Jean Brissaud. Translated from the second French Edition by Rapelje Howell, with Introductions by W. S. Holdsworth and John H. Wigmore. Boston: Little, Brown, and Company. 1912. pp. xlviii, 922.

This, the second volume published in The Continental Legal History Series, is volume two of Professor Brissaud's complete work. Volume one, which deals with the history of French public law, will be published as volume nine of the series. The introductory chapter on Primitive Law has, however, been transferred from the latter volume to this.

After the introductions by Dean Wigmore and Professor Holdsworth, nothing remains to be said as to the position occupied by Professor Brissaud's work among the many histories of French law. For depth of scholarship and for the wideness of the field covered, it is not surpassed by any, and its value to the student of Anglo-American law is increased many times by the constant references to English books of authority. French legal history, if for no other reason than because of the light it tends to throw upon the beginnings of our own law, ought to be of the greatest interest and importance to us. But apart from this, Professor Brissaud's history has a value for us. His painstaking and careful working out of doctrines and institutions, which, so far as the law of northern France is concerned, have in their origins many things in common with those of English law, but which now have become widely different, cannot but help to overcome, what Professor Holdsworth in his introduction calls "a complacent, and, may we add, an uninformed belief, in the excellencies of our own private law." The excellencies of the common law, no one who is not ignorant will care to deny, but there is nothing more petrifying in its effect upon the development of our law than the belief, formerly more widely held than now, that the common law is the final word in juristic science. Professor Brissaud's history, with its great wealth of detail and its profound scholarship, ought to convince any who may still hold such views, that no system of law, however perfect, is a finality.

Professor Brissaud has considered his subject matter by topics and not by periods, and a chapter is devoted to each of the following: The Family, Ownership and Real Rights, Obligations, Interstate Succession and Gratuitous Conveyances, System of Property between Spouses, Status and Capacity of Persons.

The translation seems well done, though there are awkward constructions here and there and some errors, probably those of the printer. The use of "*statu quo*," in the nominative and objective cases, as on pages 319 and 333, can hardly be defended.

E. R. J.

GESCHICHTE DER QUELLEN UND LITTERATUR DES ROEMISCHEN RECHTS. By Paul Krueger. Second Edition. Munich and Leipzig: Duncker and Humblot. 1912. pp. x, 444.

This second edition of Professor Krueger's monumental work will be warmly welcomed and eagerly read by all interested in the history of the sources and literature of Roman law, for it contains the results of the most recent discoveries in archæology bearing upon the subject. The chief value of this second edition lies indeed in the additions made in consequence of these new discoveries of source-material rather than in the few changes here and there found

necessary as a result of the investigations of other scholars since the publication of the first edition.

The period embraced by Professor Krueger in his work extends from the earliest times in Roman history down to the reign of the Emperor Justinian. The book is divided into three parts, which treat respectively of the era of the kings and the Republic, the Empire up to and including the reign of Diocletian, and from Constantine to Justinian.

The book is extremely readable, and will prove of value not only to all who are interested in the fascinating study of Roman law, but to students of classical history generally.

W. S. MCN.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury and other lawyers. In about twenty volumes. London: Butterworth and Company; Philadelphia: Cromarty Law Book Company.

Vol. XX. Markets to Misrepresentation. 1911. pp. cci, 763, 63.

Vol. XXI. Mistake to Partition. 1912. pp. ccxxviii, 867, 68.

Vol. XX contains articles on Markets and Fairs (59 pp.), Master and Servant (221 pp.), Medicine and Pharmacy (82 pp.), Metropolis (106 pp.), Mines, Minerals and Quarries (156 pp.), and Misrepresentation and Fraud (110 pp.). The article on Master and Servant is of constant interest to an American lawyer; and that on Misrepresentation and Fraud, from the master hand of Mr. G. Spencer Bower, is a valuable treatise in itself.

Vol. XXI contains articles on Mistake (34 pp.), Money and Money-lending (29 pp.), Mortgage (283 pp.), Negligence (134 pp.), Notaries (9 pp.), Nuisance (72 pp.), Parliament (197 pp.), Partition (59 pp.).

The standard set by the preceding volumes appears to be maintained. The series is a collection of very admirable treatises on English law.

J. H. B.

TAX EXEMPT AND TAXABLE INVESTMENT SECURITIES. By Sydney R. Wrightington and Weld A. Hollins. Boston: Financial Publishing Company. 1913. pp. 234.

As a manual for lawyers and investors in investment securities this book should be highly useful. It gives in convenient form the laws of the various states which levy a direct property tax on investments. Inheritance taxes and stock transfer taxes are not included. Investments are classified as stocks, bonds, notes, and deposits. "Stocks" is subdivided into stocks of banks, public service corporations, insurance corporations, manufacturing corporations, other business corporations, and unincorporated associations. Under "Bonds" United States, state and municipal bonds, local and foreign, and corporation bonds are treated. "Notes" deals with commercial paper, and notes secured by real estate mortgages. "Deposits" treats of deposits in national, state, savings, and foreign banks. The book does not purport to be a legal treatise. It is intended as a convenient manual, and it apparently fulfils its purpose satisfactorily.

THE INHERITANCE TAX LAW. By Arthur W. Blakemore and Hugh Bancroft. Boston: Boston Book Company. 1912. pp. iv, 1376.

This book is a painstaking collection of decisions, statutes, and facts as to the organization of corporations. It also contains the inheritance tax statutes of all the states. The references are accurate, and the book should be a very convenient one to the practitioner.

- LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS. By James Barr Ames. With a Memoir. Cambridge: Harvard University Press. 1913. pp. viii, 553.
- THE LAW OF DAMAGES AND COMPENSATION. By F. O. Arnold. London: Butterworth and Company. 1913. pp. lxxvi, 316, 51.
- THE TWO HAGUE CONFERENCES. By Joseph H. Choate. Princeton: The Princeton University Press. 1913.
- A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS. By Thomas Gold Frost. Fourth Edition. Boston: Little, Brown, and Company. 1913. pp. xv, 926.
- CORPORATE PARLIAMENTARY RULES. By Benjamin W. Hahn. Los Angeles: David R. Faries. 1913. pp. 82.
- LAW OF COMMERCIAL EXCHANGES. By Chester Arthur Legg. New York: Baker, Voorhis and Company. 1913. pp. xxxiv, 381.
- THE FIXED LAW OF PATENTS. By William Macomber. Second Edition. Boston: Little, Brown, and Company. 1913. pp. clxix, 1044.
- THE CANADIAN TORRENS SYSTEM. By Douglas J. Thom. Calgary, Canada: Burroughes and Company, Ltd. 1912. pp. xxvi, 782.

HARVARD LAW REVIEW.

VOL. XXVI.

MAY, 1913.

No. 7.

CONDITIONAL DELIVERIES OF DEEDS OF LAND.

NORMALLY the final act of the grantor in the making of a deed of land is its delivery to the grantee. It is not necessary for the purposes of this article to enter into any exhaustive analysis of the essentials of a good delivery; to consider whether delivery is purely a question of the grantor's intent or whether that intent must be evidenced by some external physical act, or the further question whether in addition to this intent there must be a physical tradition or other dealing with the instrument. Assuming a sufficient external manifestation of intent and a sufficient physical delivery of the instrument, the question whether this otherwise complete instrument becomes operative as a deed may be said to be a question of the grantor's intent. If he intends that this otherwise complete instrument shall now become operative as his deed, it does now so become; if he does not so intend; then, in the absence of facts that will raise an estoppel against the grantor it will not be treated as his deed. Consequently if A. signs and seals a conveyance of land in favor of B., but keeps it in his desk with nothing more than the idea that he may at some future date deliver it, there is clearly no deed. The situation is unchanged if he puts it in the hands of a third person to keep for him. On the other hand, if A. takes this otherwise complete instrument executed in favor of B. and hands it over as his deed to B., who accepts it as such, it needs no citations to establish that the title to the land thereupon

passes from A. to B. The same consequence follows if A., intending thereby to make the instrument operative as his deed, delivers it as such to X. as the agent of B., and this is equally true whether X. is the duly authorized agent of B. or whether he is in fact a stranger to B., provided that the latter subsequently ratifies his act. Whether in general a separate act of acceptance by B. is necessary to make the instrument operate as a deed need not be discussed.

For the purposes of this article the important feature in the illustrations given is the fact that, whether the transaction is immediate between A. and B., or whether a third person X. is involved, the transfer of title is (save for the question of acceptance above alluded to) instantaneous. If X. is merely A.'s agent and A. has not yet manifested his intent that the instrument should operate as his deed, it is a nullity, and B., whatever his equitable rights may be, has no legal interest in the property. If X. is acting as B.'s agent, authorized or unauthorized, and A. has made a delivery to him as such, the title is wholly in B. and A. has no legal interest in the property save as it may be reserved to him upon the face of the instrument.

Between these two extremes lies a group of cases where, without making any attempt to state the situation with technical exactness, it may be said that the transfer from A. to B. of the title, using this term to denote the sum total of the real rights that are the subject matter of the deed, is not instantaneous. This situation arises when the third person X., to whom the deed is handed over, is the agent of both A. and B.; where the deed has passed out of the control of A. but where its coming into the complete control of B. is dependent upon a contingency of some kind. This is the class of case that is loosely referred to as an escrow, or conditional delivery.

Looking at the cases somewhat more carefully, it will be seen that there are three fundamentally different situations which are embraced within the more general phrases above-mentioned. (1) B. may have a contractual right against A. with respect to the land, and the conveyance may be executed by A. and left with X. to be by him delivered to B. upon the performance by the latter of his part of the contract. This is the situation to which the term "escrow" is most fittingly and commonly applied. (2) A. may execute a conveyance in favor of B. and give it to X. to be by him

delivered to B. upon A.'s death. (3) A. may execute a conveyance in favor of B. and give it to X. to be by him delivered to B. upon the happening of some contingency other than those above mentioned. Each of these groups will be separately considered.

I.

Suppose that A. and B. make a contract to sell and buy respectively a piece of land, and that A. further agrees to and does in fact execute in proper form and give to X. a deed of the land. X., it is agreed, is to hold it until B. performs his part of the contract and is then to deliver it to B. B. performs his part of the contract, which we may assume to be the payment of the purchase price, and X. delivers to him the deed. B. gets a good title. When did the instrument become A.'s deed so as to pass the legal title to B.? Obviously not when A. handed it over to X., for he did not intend that it should at that time become his deed. His intent was, and it was sufficiently externally manifested by the terms under which he delivered the instrument to X., that it should become his deed when the consideration was paid by B. There seems to be no difference of opinion on the proposition that both *inter partes* and as regards third persons who stand in no peculiar relations to either A. or B. the escrow becomes a deed and the title passes at the second delivery.¹ Thus when at the time of the first delivery there was an outstanding interest in the land which is bought in by the grantor before the second delivery there is no breach of the covenants of title;² so as to an incumbrance removed between the two deliveries by the grantee, the fact that it was in existence when A. delivered to X. is no breach of the covenant against incumbrances;³ so the fact that A. has delivered the escrow to X. for B. cannot be set up by A.'s tenant in bar of a distraint for rent by A.⁴

Suppose, however, that after the delivery from A. to X. but before B. performs, A. directs X. not to deliver the instrument to B. on B.'s performance. What are now B.'s rights? It has been held

¹ Hull v. Sangamon River Drainage District, 219 Ill. 454, 76 N. E. 701 (1906); Andrews v. Farnham, 29 Minn. 246, 13 N. W. 161 (1882). See County of Calhoun v. American Emigrant Co., 93 U. S. 124 (1876).

² Furness v. Williams, 11 Ill. 229 (1849).

³ Hoyt v. McLagan, 87 Ia. 746, 55 N. W. 18 (1893).

⁴ Oliver v. Mowat, 34 U. C. Q. B. 472 (1874).

that he may if he wishes, after performance or tender, ignore the delivery in escrow, and go into equity and compel A. to execute a new deed.⁵ He need not, however, so do. If X., after performance by B., delivers the deed to B. despite A.'s order to the contrary, it is well settled that this will be sufficient to vest the legal title in B.⁶ If X. does not deliver the deed after performance by B., the title is nevertheless held to pass,⁷ and B. may maintain a bill in equity against X. to compel him to deliver the deed,⁸ or if the deed has wrongfully been delivered by X. to a third person, B. may maintain trover for it against such third person.⁹ There is no hardship on A. in this rule and it is an easy way of accomplishing justice, but for an understanding of other aspects of the law of escrow it is well to see exactly what is done in this case. As has been already pointed out, the general rule is clear that the delivery of a deed is fundamentally a question of the grantor's intent. If he executes and delivers the deed in pursuance of a decree of a court of equity his intent is immaterial, because the only court to which he could go to get relief against this deed is the one that has ordered him to make it. But in the present case the instrument has been voluntarily executed, and although he may be guilty of a breach of contract in not consenting, at the time when the grantee performs, that it shall become operative as his deed, the fact still remains that he does not so consent. Upon what principle then can the court nevertheless declare it to be effective as his deed? Let us for a moment consider a different kind of case.

Suppose, independently of any question of escrow, that A. contracts with B. to sell and B. to buy a piece of land. B. pays or tenders the price; A. refuses to convey. B. can go into equity and obtain a decree compelling A. to execute a deed in due form. As has just been mentioned, the fact that A. at the moment when he was delivering the deed in pursuance of the decree was in a state of internal rebellion and in fact did not intend the instrument as his

⁵ *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958 (1900).

⁶ *Wymark's Case*, 5 Coke 74 a (1594); *Bradbury v. Davenport*, 120 Cal. 152, 52 Pac. 301 (1898); *Hughes v. Thistlewood*, 40 Kan. 232, 16 Pac. 629 (1888); *Regan v. Howe*, 121 Mass. 424 (1877); *Farley v. Palmer*, 20 Oh. St. 223 (1870).

⁷ See cases cited in preceding note.

⁸ *Tombler v. Sumpter*, 97 Ark. 480, 134 S. W. 967 (1911); *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172 (1905); *Knopf v. Hansen*, 37 Minn. 215, 33 N. W. 781 (1887).

⁹ *Hooper v. Ramsbottom*, 6 Taunt. 12 (1815).

deed would make no difference. It would have all the earmarks of a deed, and B.'s title acquired under the deed would be unimpeachable.¹⁰ Now consider the situation when there is in fact this escrow which A. has agreed shall become his deed upon the payment by B. of the purchase price. B. has paid, but A. has refused his consent that it shall become his deed. Here already at hand is a document which bears all the earmarks of A.'s deed; B.'s equitable right is clear to compel performance by A. of his part of the contract, but such a deed when executed by A. will, so far as outward appearance goes, be no more A.'s deed than the one now in existence. Under such a state of facts it is not to be wondered at that a court should simply make a short cut, ignore the non-existence of A.'s intent and declare the present document to be binding at law as his deed. The court may say that A.'s intent in this kind of case is immaterial, or it may put the doctrine in the form of a fiction and say that his intent is "irrevocably given" or is "conclusively presumed to continue." The important fact is, that in a case where there would be relief in equity the courts have seized on the existence of the escrow to work out the same relief under a legal formula.¹¹

When the rights of third persons are involved, the fictional character of the doctrine of delivery in escrow and the fact that it is essentially a working out of equitable rights under legal formulæ are more clearly perceptible. Thus, suppose that after A. and B. have contracted as before, A., after depositing the escrow with X. but before B. performs, dies, leaving an heir, C. Now not only is it clear that when B. performs A. cannot intend the instrument to operate as his deed, but there is the further difficulty that at that time the legal title to the land is not in A. but in C. Plainly B. could go into equity here and get a conveyance from C. since the

¹⁰ Compare "Specialty Contracts and Equitable Defences," by James Barr Ames, 9 HARV. L. REV. 49, at 57, 58.

¹¹ In *Jackson v. Catlin*, 2 Johns. Cas. (N. Y.) 248 (1807), Chancellor Kent discussed at some length the character of the right of a grantee in an escrow and came to the conclusion that it was in the nature of a condition, personal to the grantee, and did not pass to the state under an act of attainder that forfeited "all his estate, both real and personal, held or claimed by him, whether in possession, reversion, or remainder, and also all estates and interests claimed by executory devise or contingent remainder." It is worth noting that the statute does not in terms include equitable interests.

latter is not a *bonâ fide* purchaser. Can the court of law use the instrument previously executed and still in X.'s possession to accomplish the same result? Surely. All that is necessary is for the court to say that on the performance by B. and the delivery by X. the deed of A. "relates" to the time of the original delivery by A. to X. Thus B. is saved the need of a recourse to equity. Such a statement, of course, is another fiction — the language used really explains nothing. If, however, the suggestion already made be borne in mind and if the law as laid down be regarded as being, as in the situation previously considered, a working out in legal forms of equitable rights, the case becomes readily understandable. There are a number of decisions that hold under just these facts that as a matter of law A.'s deed operates to convey to B. a title that is good as against A.'s heir, A. having died after the delivery to X. but before the performance by B.¹²

This fiction of relation is a hard tool to handle: under what circumstances will the second delivery relate to the first so as to cut out intervening rights? It must be admitted that the rules ordinarily laid down are of no great assistance in a specific case, whether we take the statement of Sheppard's Touchstone¹³ "that to some purposes it hath relation to the time of the first delivery and to some purposes not," or the language that the courts at present not infrequently use, that the deed will relate where it is necessary "to accomplish justice." If the principle that has already been suggested, namely, that the courts in their determination of the rights created under a delivery in escrow have been unconsciously working out in legal form by means of fictions what are essentially equitable rights, is capable of general application it ought not to be difficult to arrive at a perfectly specific answer to the question as to when the legal title derived under an escrow relates to the first delivery. If C., the person whose rights intervene between the first and the second delivery, is a purchaser for value from A. without notice of B.'s rights, then there will be no relation; the second delivery will

¹² Davis v. Clark, 58 Kan. 100, 48 Pac. 563 (1897); Guild v. Althouse, 71 Kan. 604, 81 Pac. 172 (1905); Cook's Adm'r v. Hendricks, 4 T. B. Mon. (Ky.) 500 (1827); Webster v. Trust Co., 145 N. Y. 275, 39 N. E. 964 (1895); Van Tassel v. Burger, 119 N. Y. App. Div. 509, 104 N. Y. Supp. 273 (1907). The language of the court in Teneick v. Flagg, 29 N. J. L. 25 (1860) is *contra*, although the case is distinguishable on the facts.

¹³ P. 59.

be too late to affect C.'s previously acquired title and B. will lose. If C. is not a *bonâ fide* purchaser we may expect that the court, instead of saying that C. has the legal title but subject to an equity in favor of B. which B. may protect in a court of chancery, will say that the escrow deed relates to the first delivery and so gives B. the older legal title and that C. gets no legal title at all. An examination of the cases in which the question has been raised will show that so far as the actual decisions go there is almost complete unanimity in the results reached. The following are the more important characteristic cases that raise this question.

A. and B. make a contract for the sale of land and A. delivers his escrow to X. for B. A. then marries C. B. then performs and the deed is delivered. It will relate to the first delivery so that C., the wife, will have no dower interest in the land, and the deed will not be open to the objection that it does not pass a clear title.¹⁴

Again, where A., after the delivery of the deed in escrow to X., sells the same land to C., who gives therefor a valuable consideration but knows of the deed delivered in escrow to X., B., the grantee in the escrow deed, will, on performing the conditions of the escrow and getting the deed, obtain thereby a title that is at law superior to that which C. obtained from A.¹⁵

An attaching creditor is not, in most jurisdictions, treated as a purchaser for value; consequently as against him also the title of B., the grantee, will "relate" to the first delivery and defeat the attachment.¹⁶

¹⁴ *Vorheis v. Kitch*, 8 Phila. (Pa.) 554 (1871).

¹⁵ *Leiter v. Pike*, 127 Ill. 287, 20 N. E. 23 (1889); *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467 (1902), *semble*; *Lewis v. Prather*, 14 Ky. L. Rep. 749, 21 S. W. 538 (1893). Three California cases are worth noting in regard to the nature of the right that the grantee in the escrow deed obtains as against a purchaser for value with notice who gets his title between the first and second escrow deliveries. In *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315 (1887), the court held that the legal title went to C., the *malâ fide* purchaser, but that B., the grantee in the escrow deed, was entitled to a conveyance of the title. In *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580 (1887), on the same state of facts, where the action was for the possession of the land, the court held that B. was entitled to possession as against C. In *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499 (1888), on the same state of facts the court again held that B. was entitled to possession against C., and further said that as against B., C. "gets no title." See also *Wittenbrock v. Cass*, 110 Cal. 1 (1895).

¹⁶ *Dettmer v. Behrens*, 106 Ia. 585, 76 N. W. 853 (1898); *Whitfield v. Harris*, 48 Miss. 710 (1870); *Hall v. Harris*, 5 Ired. Eq. (N. C.) 303 (1848). *Walcott v. Johns*, 7 Colo. App. 360, 44 Pac. 675 (1896), is sometimes cited as *contra*. In that case A., the vendor, was endeavoring to compel B. to accept a title against which there ex-

*Price v. Pittsburg R. Co.*¹⁷ presents a different illustration of the same tendency. In that case the land covered by the escrow was occupied by tenants. The vendees paid interest on the purchase price from the date of the delivery to X., the holder of the escrow. After performance and delivery of the deed the title was held to relate to the first delivery, and the vendees were allowed to maintain against the tenants an action of assumpsit for use and occupation from the date of the first delivery of the escrow.

Over against these cases is to be set the case where C. occupies the position of a *bonâ fide* purchaser. Thus under the recording law of Oregon an attaching creditor is treated as a purchaser for value.¹⁸ A. and B. had made a contract for the sale of the land and A. had deposited the deed in escrow with X. B. had made part payment. C., a creditor of A., then attached. It was held that any further payments to X. for A. made by B. after notice of C.'s attachment were ineffectual as against C., who by his attachment obtained all the interest that A. still retained in the premises, namely, the bare legal title and an equitable right to hold that title for the unpaid balance of the purchase price.¹⁹

Thus far in the cases that have been examined B.'s equity has been the older, and the question has been whether the later transaction with C. did or did not cut it off or, to put it correspondingly in the formula that is usually employed, whether B.'s deed did not or did relate. This application of the doctrine of relation in escrow in exact analogy to the principles of equity appears, however, in other ways. Thus in one case A. derived title from C. under a voidable tax deed duly recorded. A. had brought an action to quiet title against C. and judgment had been rendered in A.'s favor. A. later contracted to sell and B. to buy the land, and A. executed a deed and deposited it in escrow with X. for B. C. then filed a motion to reopen the proceedings in the action to quiet title and to set aside

isted C.'s attachment lien, acquired with notice of the relation between A. and B. The court held that B. could not be compelled to accept a doubtful title. In *Jackson v. Rowland*, 6 Wend. (N. Y.) 666 (1831), the attaching creditor prevailed over the grantee in escrow. It is not clear in that case, however, that at the time of C.'s attachment there was any definite contract with respect to the sale of the land.

¹⁷ 34 Ill. 13 (1864).

¹⁸ Oregon, Hill's Ann. Laws, sec. 150.

¹⁹ *May v. Emerson*, 52 Or. 262, 96 Pac. 454, 1065 (1908).

the judgment in A.'s favor. B. paid the purchase price and received the deed, and was then made a party to the proceedings. It was held that B. had constructive notice by the filing of C.'s motion, and that consequently as against C. his deed would not relate, if the title should ultimately be found to be in C.²⁰ This case is a very pretty illustration in legal language of the equitable principle that the owner of the junior equity who gets his equity in good faith and who then starts to get in the legal title will take the legal title subject to the older equity provided he has notice of the older equity before paying the purchase price.²¹

An unconscious application of another principle of equity to the doctrine of relation is seen in *Frost v. Beekman*.²² A., in pursuance of a contract with B., delivered to X. a conveyance of the land to be delivered to B. when he should give X. a duly executed mortgage of the land in favor of A. B. made a deed of the land to C. B. then executed the mortgage to A., had it recorded, delivered it to X. and received from X. the conveyance executed by A. Both A. and C. acted without actual notice. It was held that as between A. and C. the conveyance from A. to B. would not relate, because so to hold would make the mortgage to A. subsequent to the conveyance to C.; and as the escrow is allowed to relate only "to do justice" it would not be allowed so to do in this case; with the consequence that C. took subject to A.'s mortgage. The court added that as between A. and B. the escrow would relate. Had there been no conveyance in escrow here but merely an agreement to convey, and had B. then deeded to C., then mortgaged to A. and contemporaneously taken a deed from A., it seems clear that a court of equity in settling the rights of the parties would have reached the same result that was reached here in legal form.²³

Another illustration of the underlying principles of the doctrine of relation is the following case. A. contracted with B. and C. for the sale of land, and in pursuance of the contract left with X. his escrow executed in favor of B. and C. B. died before the performance of the contract. It was held that upon the performance

²⁰ *Baker v. Snively*, 84 Kan. 179, 114 Pac. 370 (1911).

²¹ Ames, *Cases on Trusts*, 2 ed., 287.

²² 1 Johns. Ch. (N. Y.) 288 (1814), reversed on other grounds, 18 Johns. (N. Y.) 544 (1820).

²³ Cf. *Eyre v. Burmester*, 10 H. of L. 90 (1862); Ames, *Cases on Trusts*, 2 ed., 306.

of the contract by C. and the delivery of the deed by X. B.'s heir and C. took the legal title as tenants in common.²⁴

As previously pointed out the regular rule is, soundly enough, that *inter partes* the title in an escrow deed passes at the second delivery. Where, however, even *inter partes* the analogy to doctrines of equity would require the court to hold that the deed relates, it has not hesitated so to do. Take, for example, the rule of equity that where the vendee pays interest on the purchase price from the time of the making of the contract up to performance, he is entitled to the rents and profits of the land in the absence of an express contract giving them to the vendor.²⁵ A. and B. made a contract for the conveyance of a tract, the deed was deposited in escrow with X., A. collected the rents until the second delivery by X. to B., the latter having also paid interest on the purchase price. It was held that on the delivery of the deed the title related to the first delivery and B. was allowed to maintain an action against A. for breach of the covenant of warranty.²⁶

Before leaving this branch of the subject, there is one slightly different class of case that should be noticed. Thus far we have dealt with cases where the agreement between A. and B. consisted of a mutually enforceable contract, in pursuance of which the deed was delivered in escrow. Is there any difference in the application of the doctrine of relation if A. gives B. a binding option on the land? So far as the rights of the parties in a court of equity are concerned, it has been said in England²⁷ that B. will be unable to enforce this option as against a purchaser from A. of the legal title, this case being regarded as coming within the principle laid down in *Haywood v. Brunswick Building Society*²⁸ that a court of equity will not enforce an affirmative obligation relating to the land against another than the original contractor. In this country, however, there are several decisions and *dicta* to the effect that such an option is enforceable against a person who takes under A. with notice or without paying consideration.²⁹ In the working out of these same

²⁴ *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26 (1887).

²⁵ 29 Am. and Eng. Encyc. of Law, 2 ed., 708.

²⁶ *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117 (1906). Compare *ante*, p. 567.

²⁷ *London & Southwestern Ry. v. Gomm*, 20 Ch. D. 562, 583 (1882).

²⁸ 8 Q. B. D. 403 (1881).

²⁹ *Ross v. Parks*, 93 Ala. 153, 8 So. 368 (1890); *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723 (1898); *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46 (1890); *Cummins*

equitable principles in the escrow cases no distinction is made between the mutually enforceable contract and the option. In fact it is frequently difficult to discover whether the agreement between the parties, in pursuance of which the delivery in escrow was made, was a mutual contract or an option. There are, however, a few cases where it seems clear that there was only an option. Thus where in pursuance of an option contract A. deposited in escrow with X. a deed in favor of B. and died devising the land to C., B. on a subsequent compliance with the terms of the option was held to have obtained by A.'s deed a legal title good "by relation" against the devisee;³⁰ in another similar case such a deed was held binding against A.'s heir,³¹ and in another against a purchaser with notice.³²

It seems clear then that in these cases of escrows the courts have, with one or two possible exceptions, uniformly in varying sets of circumstances worked out what they have treated as the legal rights of the parties in precisely the same way that a court of chancery would have worked them out as equitable rights.

II.

In the class of cases just considered, the two salient facts have been these: first, that A., the grantor, did not intend by the execution and delivery of the deed to the holder in escrow thereby to pass to B., the grantee, any interest in the land; whether the deed should ever become operative remained an uncertainty depending upon whether or not B. performed his part of the contract: second, that B. had throughout an equitable interest in the land. The class of case now to be considered differs in both regards from the preceding group. Suppose that A. executes in favor of B. a deed of Blackacre and gives it to X. and says, "This is for B., give it to him at my death." What rights arise out of this transaction?

At the outset a rather difficult question of fact sometimes presents itself. Does A. mean to keep control over his deed so that

v. Beavers, 103 Va. 230, 48 S. E. 891 (1904); *Marthinson v. King*, 150 Fed. 48 (1906).

³⁰ *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729 (1890).

³¹ *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958 (1900).

³² *Baum's Appeal*, 113 Pa. St. 58, 4 Atl. 461 (1886). See also *Whitmer v. Schenk*, 11 Idaho 702, 83 Pac. 775 (1906).

he still has the right to take it back, with the result that the situation really is that X. is to deliver the deed to B. only if A. does not tell him to do something else with it, *i. e.*, is X. really holding it simply as A.'s depository; or has A. definitely parted with all control over it, does he regard the transaction as finished so that the matter of B.'s getting the land is only a question of time? ³³ If the former view be taken of the facts the whole question falls. The decided preponderance, both of decisions and *dicta*, is that unless A. relinquishes all control over the instrument at the time of the delivery to X. it differs in no wise from a will, because not until the moment of A.'s death can it be regarded as definitely intended to be operative; and being in substance a will, it must fail of effect because it does not satisfy the statutory requirements of a will.³⁴

Assuming that A. reserves no such control over the deed as to make it substantially a testamentary instrument, and so bad for the reasons just considered, what are the rights that arise from the delivery to X. of the deed for B.? There seem to be two pretty clearly defined theories on which the courts have proceeded, although it must also be pointed out that in some cases the courts seem to have shifted from one view to the other, apparently without any clear appreciation of the fact that they were so changing their position.

In the larger number of states where this question has arisen for adjudication the rule has been laid down that the delivery by A. to X. vests immediately the title to the land in B.³⁵ In some states

³³ For cases where the decision has turned on this question of fact *cf.* *Jones v. Loveless*, 99 Ind. 317 (1884), with *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (1887); *Hale v. Joslin*, 134 Mass. 310 (1883), with *Arnegard v. Arnegard*, 7 N. D. 475, 75 N. W. 797 (1898); and the majority and minority views in *Hathaway v. Payne*, 34 N. Y. 92 (1865).

³⁴ *Doe v. Bennett*, 8 C. & P. 124 (1837); *Wellborn v. Weaver*, 17 Ga. 267 (1855); *Stinson v. Anderson*, 96 Ill. 373 (1880); *Jones v. Loveless*, *supra*; *Carey v. Dennis*, 13 Md. 1 (1858); *Hale v. Joslin*, *supra*; *Cook v. Brown*, 34 N. H. 460 (1857), overruling *Shed v. Shed*, 3 N. H. 432 (1826); *Prutsman v. Baker*, 30 Wis. 644 (1872). In some few jurisdictions it has been held that the fact that the grantor reserved the power to revoke the deed will not make it bad if in fact he dies without having exercised the right of revocation. *Belden v. Carter*, 4 Day (Conn.) 66 (1809); *Woodward v. Camp*, 22 Conn. 457 (1853) (but see *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337 (1905)); *Ruggles v. Lawson*, 13 Johns. (N. Y.) 285 (1816); *Morse v. Slason*, 13 Vt. 296 (1841).

³⁵ *Doe v. Bennett*, 8 C. & P. 124 (1837); *Schurz v. Schurz*, 153 Ia. 187, 128 N. W. 944 (1910); *Thatcher v. St. Andrews*, 37 Mich. 264 (1877); *Wicklund v. Lindquist*, 102 Minn. 321, 113 N. W. 631 (1907) *semble*; *Brown v. Westerfield*, 47 Neb. 399,

this rule is accompanied by the qualification that B.'s interest is subject to a life estate in favor of A.³⁶ The rule as thus laid down undoubtedly achieves just the result that the grantor had in mind. By his delivery to X. he intends to settle the matter once for all, and then and there to vest in B. a definite, indestructible, real right. By his direction to the depositary to retain the deed in his own possession until the death of the grantor, he clearly has in mind the creation of a situation such that he shall not be disturbed in the possession of the property during his life. On just what theory the courts proceed in their doctrine that A. has a life estate is not clear. There is ordinarily nothing on the face of the instrument sufficient to create such an estate.³⁷ The result may perhaps be reached upon the theory of a resulting use which would give A. a legal life estate; or upon the theory of a trust of some sort which would give him an equitable estate, although the relation of such to the Statute of Frauds is nowhere, so far as the writer is aware, discussed in these cases; or, which would seem perfectly sound, the courts may mean simply that since the deed is in the possession of X. and will not be delivered to B. until A.'s death, there is no one who can disturb A. in the possession of the land and that consequently he has what is substantially as good as a life estate; perhaps with the further implication that should B., prior to A.'s death, obtain possession of the deed by fraud or otherwise, a court of equity at least would protect A. in the enjoyment of the premises.

The theory above outlined is simple and, if the statements of the court as to the existence of a life estate in the grantor be taken in the sense last suggested, is not inconsistent with other branches of the law of real property. In a number of jurisdictions, however, the courts have used language which, taken at its face value, would

66 N. W. 439 (1896); *Schlicher v. Keeler*, 61 N. J. Eq. 394, 48 Atl. 393 (1901), *semble*.

³⁶ *Bury v. Young*, 98 Cal. 446, 33 Pac. 338 (1893); *Wheelwright v. Wheelwright*, 2 Mass. 447 (1807); *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797 (1898); *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756 (1909). See *infra*, note 39.

³⁷ In some cases the language of the deed is held to amount to an express reservation of a life estate in the grantor. *West v. Wright*, 115 Ga. 277, 41 S. E. 602 (1902); *Douglas v. West*, 140 Ill. 455, 31 N. E. 403 (1892); *Hunt v. Hunt*, 119 Ky. 39, 82 S. W. 998 (1904); *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. 287 (1893); *Ball v. Foreman*, 37 Oh. St. 132 (1881).

seem to indicate that in the class of case now under consideration they thought the rule to be that the title passes from A. to B. only on the delivery of the deed by X. to B., or perhaps at the moment of A.'s death, with the corollary that when necessary for the purposes of justice the title will relate to the time of the delivery from A. to X.³⁸ This whole doctrine is undoubtedly derived from the class of true escrows already considered in the first part of this article; indeed the courts sometimes refer to the present situation as being a delivery in escrow. The fundamental differences, however, between the two kinds of cases are obvious. As already pointed out, the reason why in the true escrows A. cannot change his intent after the delivery of the deed to X., or to put it more accurately, why his change of intent is immaterial, and the reason why the deed relates under certain circumstances is that B. throughout has in the land an equitable interest that is being protected in these legal forms. This foundation is here wholly lacking; B. is, *ex hypothesi*, a donee; he has neither paid any consideration nor performed any act that would raise an equity in his favor. On the theory now under consideration that no title passes to B. until A.'s death, it is hard to perceive any reason why A. should not be permitted to change his mind and revoke his deed at any time prior to his death. Not only does B. on this theory not have any real rights, but he has not even a contract right. And if A. may change his mind at any time prior to his death, the document would seem in substance to be a testamentary instrument and bad if it fails to satisfy the requirements necessary to a will. The truth of the matter seems to be either that the courts use this phraseology loosely and without meaning exactly what they say (as will be pointed out in the next paragraph), or else we have here a possible new doctrine in the law of conveyances by deed which will be considered more at length later on.

Admitting that there seems to exist in this branch of the subject this conflict in the doctrines held by the different courts, the more important question is as to how real this apparent conflict is. If we direct our attention not to the language of the courts but to the result that they reach, the differences between these two groups of decisions largely disappear. There is a peculiar justification for

³⁸ *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. 427 (1904); *Stephens v. Rinehart*, 72 Pa. St. 434 (1872); *McCalla v. Bane*, 45 Fed. 828 (1891). See *infra*, note 39.

disregarding the exact language of the courts in these cases, because of the fact already alluded to that in some instances in the same jurisdiction the court has at one time apparently based its decision upon the ground that the title passes to the grantee at the moment of delivery by the grantor to the depositary, and at another time upon the ground that it passes as of the date of the second delivery, but relates.³⁹ Looking then only to the facts of these cases it will be seen that in almost nine-tenths of them the contest is between B. the grantee of the deed and the heirs of the grantor. In such a case the only real question is whether B. has the title. How or when he got it is of minor importance. Under such circumstances the statement that the title passes only at the second delivery, or the further statement that when it passes it relates to the first delivery, need not be taken with literal exactness.

Conceding, however, that in most of the cases it is unnecessary to do more than decide that B. has at some time acquired from A. a title that is good against A.'s heir, if the contest arises between the grantee under the deed and some person who claims a right derived from A. between the first and the second delivery the need for an exact delimitation of the rights of the parties then becomes imperative. If the court goes on the theory that B. gets title from the first delivery so that the utmost that A. has after the delivery of the deed to X. is a legal life estate, then any person claiming under A., whether as purchaser, creditor, or donee, would acquire no property right that could be asserted against B. after A.'s death. The possibility of the common-law rights of the person claiming under A. being

³⁹ Thus in Connecticut, in *Woodward v. Camp*, 22 Conn. 457 (1853), the court seems to follow the theory that the title passes at the second delivery and relates; in *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337 (1905), it seems to say that the title passes at the first delivery subject to a life estate in the grantor; so in Indiana in *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678 (1887), and *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090 (1889), on the one hand, and *Stout v. Rayl*, 146 Ind. 379, 45 N. E. 515 (1896), on the other, respectively; in Missouri, in *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99 (1892), and *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337 (1911), respectively; so in New York in *Tooley v. Dibble*, 2 Hill (N. Y.) 641 (1842), and *Nottbeck v. Wilks*, 4 Abb. Pr. (N. Y.) 315 (1857), on the one hand, and *Brown v. Austen*, 35 Barb. (N. Y.) 341 (1861), on the other, respectively; in *Rosseau v. Bleau*, 131 N. Y. 177, 30 N. E. 52 (1892), and *Stonehill v. Hastings*, 202 N. Y. 115, 94 N. E. 1068 (1911), the court seems to follow the earlier cases; so in Ohio in *Crooks v. Crooks*, 34 Oh. St. 610 (1878), and *Ball v. Foreman*, 37 Oh. St. 132 (1881), respectively. See also the language of the court in *Wheelwright v. Wheelwright*, 2 Mass. 446 (1807).

enlarged by virtue of the recording acts need not at present be considered. In the cases that proceed upon this theory as to the effect of the original delivery the results reached are in accord with this reasoning. In *Brown v. Austen*⁴⁰ the contest was between judgment creditors of A. the grantor, their rights accruing after the first delivery and B. the gratuitous grantee, to whom the second delivery had been made after A.'s death. The judgment was for B. The court examined the question carefully and stated that only if the deed took effect from the first delivery would the grantee prevail as against the attaching creditors. In *Wittenbrock v. Cass*⁴¹ B. won as against one who, after the delivery by A. to X. of the deed in B.'s favor and before the delivery of the deed to B. by X., purchased the same lands from A. with knowledge of the deed to B. The court based its decision on the earlier case of *Bury v. Young*,⁴² in which case B. won as against a devisee of A. The two cases are, however, distinguishable in that in the later case B. paid a consideration.⁴³

If now we take the theory that a title passes to B. only by the second delivery, it must be clear that except in so far as B. is protected by the doctrine of relation he will lose as against anyone who in the interval between the first and the second delivery acquires from A. any interest, legal or equitable, in the same piece of land. If the interest acquired by the third person is legal, B. will clearly lose as having the later legal title. If the interest acquired by the third person is equitable, B. will also lose, for although in that case he would acquire the legal title he would get it as a donee, hence subject to previous equities. How far then in this group of cases is B. helped out by the doctrine of relation?

In *Rathmell v. Shirey*⁴⁴ the contest was between creditors of the deceased grantor and B. the gratuitous grantee. The grantor had remained in possession of the land, the creditors had no notice,

⁴⁰ *Supra*, p. 579.

⁴¹ 110 Cal. 1, 42 Pac. 300 (1895).

⁴² 98 Cal. 446, 33 Pac. 338 (1893).

⁴³ In *Blair v. St. Louis R. Co.*, 24 Fed. 539 (1885), the court held that B. after the delivery to him by X. of A.'s deed could not defeat a right of way granted in fee by A. to C. between the first and the second delivery. The court, however, based its decision upon the ground that B. was barred by the Statute of Limitations, and also referred to the fact that A. remained in possession and that the deed to B. was not at the time recorded.

⁴⁴ 60 Oh. St. 187 (1899), 53 N. E. 1098.

actual or constructive, of the deed to B. and extended credit upon the faith of A.'s apparent ownership. The court, while not finding any fraud, said that the doctrine of relation applied only to do justice, that it would not do justice to apply it here, and gave judgment in favor of the creditors.⁴⁵ It should be noticed that in Ohio lien creditors are within the protection of the recording act, and simple creditors of a deceased debtor are by virtue of the lien which arises at his death also brought within the act;⁴⁶ in other words, that the creditors here were in the position of purchasers for value without notice. In this case, therefore, even had the court proceeded upon the theory that the title passed to B. at the first delivery, the result would have been the same.

In *Smiley v. Smiley*⁴⁷ a wife of A., whom he had married after his delivery to X. of the deed to B., claimed dower in the land so conveyed. Judgment was for B., his title being said to relate to the first delivery. The court said that while marriage might be a valuable consideration, the determining element in this case was the fact that the woman married with knowledge of the conveyance to B. In *Ladd v. Ladd*,⁴⁸ where the wife's right to dower also depended upon the question whether A. died seised of the land, the court held that the deed would not relate and that the wife was entitled. This case, however, may rest upon the ground that X. was throughout the depositary for A. and not for B.

In *Stone v. Duvall*⁴⁹ B., the grantee, died after delivery to X. but during the life of A. A. thereupon filed a bill to have the deed canceled. The court held that this could not be done; that although the deed did not operate to give B. any immediate rights or interest in the premises, nevertheless it was out of A.'s power to affect it, and on his death the delivery to B.'s heir would operate by relation to vest the title in the said heir. The court referred to the fact that the deed purported to be for a consideration.

These cases are too few to justify any very general conclusions. These suggestions may, however, be made: (1) No decision, with the possible exception of *Ladd v. Ladd*, that purports to stand on this doctrine of relation reaches a result different from that which

⁴⁵ *Accord*, *Owen v. Williams*, 114 Ind. 179; 15 N. E. 678 (1888), *semble*.

⁴⁶ *Straman v. Rechtime*, 58 Oh. St. 443, 51 N. E. 44 (1898).

⁴⁷ 114 Ind. 258, 16 N. E. 585 (1888).

⁴⁸ 14 Vt. 185 (1842).

⁴⁹ 77 Ill. 475 (1875).

would have been reached had it proceeded on the more generally accepted and sounder view that title passes by the first delivery; (2) Assuming the doctrine of relation to be applicable to these cases, the application of the doctrine is harmonious with the application of it in the cases of the true escrows: *i. e.*, there is no relation of the title where the situation is such that if B., instead of being the grantee under an escrow, were the holder of an equitable interest in the land, his equity would be cut off by the transactions had between his grantor and the third person contesting B.'s right, and where the situation is such that an equity would not be cut off, the doctrine of relation is applied.

III.

The characteristic features of the two groups of cases that have been thus far considered have been these: In the first group, the delivery of the escrow by the grantor A. to the depository X. is not intended by the grantor to pass thereby to the grantee B. any interest in the property, and whether any title ever shall pass depends upon the future conduct of the grantee; in addition, however, to this delivery in escrow, there is some other transaction between A. and B. sufficient *per se* to create in B. an interest in the land that a court of equity would protect. In the second group the state of affairs is just the opposite; there is no transaction between A. and B. sufficient to give an equitable estate in the land, but on the other hand when A. delivers the deed to the depository his intent that it shall definitely operate in B.'s favor is unqualified; it may be his intent that the operation of it, so far as the giving of a possessory interest is concerned, shall be for a time postponed, but that is the only qualification. There remains for consideration a group of cases, not very numerous, in which appears neither of the affirmative factors above mentioned, *i. e.*, where there is no transaction between A. and B. sufficient to create in B. an equitable interest in the land, and where on the other hand it is not clear that A. by his delivery to X. of the deed in B.'s favor intends to part with all control over the deed and to vest at once in B. an unconditional interest in the land postponed only with respect to the possessory rights until A.'s death.

Thus, suppose that there being no contractual relation of any

sort between A. and B., A. executes a deed in favor of B. and delivers it to X. to be delivered by him to B. if B. does some act, as paying a certain sum. It has been held in such a case that the title passes to B. only upon the doing of the act.⁵⁰ On the other hand, at any time prior thereto A. may withdraw the deed;⁵¹ or if, A. being a trustee, the trust is ended, B. cannot later make the deed effective by complying with its terms;⁵² or, if A. dies before performance by B., the deed cannot later be made operative.⁵³ The court said, in this latter case, that the deed under these circumstances was nothing more than an offer, necessarily terminating on A.'s death. *A fortiori* is this result inevitable where, from the very nature of the offer upon which the deed is delivered in escrow, it cannot be performed during A.'s life, as where A. executes a deed to B., his son, and gives it to X. to deliver to B. if the latter shall after A.'s death make provision for certain specified persons.⁵⁴ The court here, from the fact that the conditions by their own terms could not be performed, and the instrument thereby become effective until after the grantor's death, said that the instrument was for this reason necessarily testamentary in character.⁵⁵ Another case in which the court definitely examined this question is *Campbell v. Thomas*.⁵⁶ The Wisconsin Statute of Frauds makes a parol contract for the sale of land void. Under such a contract with B., A. executed a deed in B.'s favor and gave it to X. to be delivered when B. paid the stipulated price. X., on A.'s instructions, refused to deliver the deed to B., and the court held categorically that it was essential to create rights under an escrow that there should be a valid contractual relation between the parties.

On the other hand, there are not lacking cases in which, on somewhat similar states of fact, the courts have held that if the contingency occurred or the requirement was satisfied by B. even after

⁵⁰ *Sparrow v. Smith*, 5 Conn. 113 (1823).

⁵¹ *Davis v. Brigham*, 56 Or. 41, 107 Pac. 961 (1910).

⁵² *Anderson v. Messenger*, 158 Fed. 250 (1907). Cf. *Anderson v. Realty Co.*, 29 Oh. Cir. Ct. 267 (1906).

⁵³ *De Bow v. Wollenberg*, 52 Or. 404, 96 Pac. 536 (1908).

⁵⁴ *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426 (1886).

⁵⁵ This appears to be the definitely established rule in Michigan. *Culy v. Upham*, 135 Mich. 131, 97 N. W. 405 (1903); *Felt v. Felt*, 155 Mich. 237, 118 N. W. 953 (1908).

⁵⁶ 42 Wis. 437 (1877).

the death of A., the title would thereupon pass to B. Thus in *Nolan v. Otney* ⁵⁷ A. executed a deed of land in favor of B. and gave it to X. It was originally intended that his delivery should be absolute, but in fact A. kept control of the deed, although it was in X.'s custody. A day or two before A. died he told X. to deliver the deed to B. if B. should pay a sum of money and execute a note. After A.'s death B. fulfilled these requirements and X. delivered him the deed. In an action between A.'s widow and B. (apparently to determine the title to the land) it was held that B. had the legal title. The court, after animadverting upon the fact that ordinarily the acts to be done by the grantee are contemplated as being performed in the life of the grantor, and pointing out that these requirements might have been complied with in the life of the grantor, said that this fact was of no importance, that there was no more difficulty in applying the doctrine of relation to this class of case than to any other case of delivery in escrow; and that upon the performance by B. of the conditions imposed by A. the title passed to the former as of the date of the original delivery of the instrument.⁵⁸ The same principle has been applied in one or two cases where there was no act to be performed by B. which could in any wise be regarded as in the nature of a consideration for the transfer of the title. In *Hunter v. Hunter* ⁵⁹ A. delivered to X. a deed in favor of B. to be delivered to him if he reached the age of twenty-five. It was held that the death of A. before B. reached twenty-five would not prevent the title passing to him upon the happening of that event, the court saying that there was by the first delivery "a quasi-creation of an estate subject to be defeated by the failure to perform the stipulated condition."⁶⁰

These latter cases seem hard to sustain on any generally accepted principles of law. The difference between these and the other deeds

⁵⁷ 75 Kan. 311, 89 Pac. 690 (1907).

⁵⁸ *Accord*, as to a bond, *Graham v. Graham*, 1 Ves. Jr. 272 (1791). In *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300 (1895), and *Hutton v. Cramer*, 10 Ariz. 110, 85 Pac. 483 (1906), the courts used language to the same effect although it was not necessary to the decisions.

⁵⁹ 17 Barb. (N. Y.) 25 (1853).

⁶⁰ See also *Cook v. Niehaus*, 8 Weekly L. Bull. (Ohio) 259 (1882). In *Prewitt v. Ashford*, 90 Ala. 294, 7 So. 831 (1890), where the grantee was apparently a donee, the court treated the conveyance as being an escrow and creating rights by relation from the time of the first delivery.

made in contemplation of death is marked. In them A. intends unqualifiedly that the title shall go to B. and regards the delivery of the deed to X. as settling matters definitely. Here the very fact that there is the further condition of something being done by B. or of some contingency's occurring, shows that the delivery by A. to X. is not intended by the grantor to be final any more than it is in the case of a true escrow. Of course, if B. performs prior to A.'s death there is no difficulty in sustaining the deed, even though the second delivery is after A.'s death, because the performance by B. would raise an equity in his favor. Where this is not the situation, B. as a volunteer has no equity, nor, as just said, has A. by the delivery to X. intended to vest a title in B. postponing only the possession. If such is the case the complete title to the property must still be in A. and at his death it must go to his heir. Once in A.'s heir, how can A.'s uncompleted deed operate to take the title from him? Merely to say that there is a rule of law that A.'s deed relates is not particularly satisfactory, especially when in the other cases of relation it is possible to find a recognized principle in analogy to which the doctrine of relation is applied.

There is the explanation suggested in *Hunter v. Hunter*,⁶¹ that the deed operates from the first delivery to vest a legal title in B. subject to a condition subsequent. This is open to several objections: it would have to be further modified to embrace the conception of the postponing of possession; it is based upon a construction of the facts that is unjustified, for the very fact that the contingency is uncertain or that B. is to do something further is strong evidence that no more here than in the case of the true escrow is the delivery to the depository intended to pass at once an estate to the grantee (it is true that the grantor intends by this delivery to give the grantee the right to get an estate, but this will be considered presently); finally, this theory is open to the fundamental objection that it attempts by parol, not to show when the deed is to be delivered, for it is generally accepted that this is not within the Statute of Frauds,⁶² but to modify the face of the deed and read into it a condition subsequent that will operate to affect the title to realty.

⁶¹ *Supra*, p. 584.

⁶² *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315 (1887); *Dikeman v. Arnold*, 71 Mich. 656, 40 N. W. 42 (1888); *Stanton v. Miller*, 58 N. Y. 192 (1874); *Gaston v. Portland*, 16 Or. 255, 19 Pac. 127 (1888); *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162 (1893).

The following suggestion may be made with respect to these cases, although no decision resting upon this ground has been discovered. The cases like *Davis v. Brigham*⁶³ are sound enough. They are cases of purely business dealings where the grantor throughout intends to do nothing more, as one of the cases itself says, than to make an offer which he can withdraw at any time prior to acceptance by the grantee. In the cases like *Nolan v. Otney*,⁶⁴ on the other hand, this is not the case. While it is true, as said before, that the grantor does not intend by the first delivery to give B. a title, since it is only if B. performs the further requirement that he is to get the deed, it is also true that A. intends to give, and probably considers that by so depositing the deed with X. he has given, B. an irrevocable right to earn the title by doing the required act or to have it come to him if the stipulated contingency happens. It may be, then, that these few cases and the language used by some of the courts in the cases considered in the preceding section indicate a tendency toward a rule that when the deed, perfect on its face and requiring no further act on the part of the grantor, is delivered by him to a depositary with the intent stated above, this is in itself a sufficient part performance by A. of the transfer of the title so that upon these facts alone an indefeasible right is created in B. to be allowed to perform within a reasonable time or to await the coming of the specified contingency, with the result that when the performance is made or the event does happen the title vests, and may be said to "relate." It is well settled that equity will, under certain circumstances, compel a donor to complete an inchoate gift in cases where at law no rights would arise.⁶⁵ It may be that here is another kind of uncompleted transaction where law is going one step beyond equity. It may be that the courts in these cases consider the gift by A., if the act required of B. be regarded as the occasion simply of the vesting of the title, or the offer by A., if the act of B. be regarded as the consideration for the transfer of the title, as having advanced to such a stage (since no further act need be required of A. and the document purporting to convey the title is out of his physical control) as to give

⁶³ *Supra*, p. 583.

⁶⁴ *Supra*, p. 584. This case, however, and *Taft v. Taft*, *supra*, p. 583, are directly *contra*.

⁶⁵ The cases are collected in 36 Cyc. 681 *et seq.*

B. something sufficiently like an equitable interest to put him in at least as good a position as the beneficiary in a voluntary declaration of trust. Of course it is obvious that B. is not the beneficiary under a declared trust, nor is he in such a position that for any other reason he could go into equity and compel a transfer of the title. At the same time, there would be nothing inherently unreasonable or unsound if a law court should declare that under facts such as we have been considering B. was entitled to be protected. That the step should be declared to be merely a new application of well-recognized principles, or that it should be taken under the kindly cover of a fiction, would surprise no one who is familiar with the way in which law develops.

Harry A. Bigelow.

UNIVERSITY OF CHICAGO LAW SCHOOL.

SOME NECESSARY AMENDMENTS OF THE NEGOTIABLE INSTRUMENTS LAW.¹

II.

Sixth. Section 64-1 and 64-2⁴³ should be amended so as to read as follows:

"1. If the instrument is a *bill or note* payable to the order of a third person, or is an *accepted bill payable to the order of the drawer or to bearer*, he is liable to the payee and to all subsequent parties.

"2. If the instrument is a *note or unaccepted bill* payable to the order of the maker or drawer or payable to the bearer, he is liable to all parties subsequent to the maker or drawer."

The American law has long recognized the liability to the payee of a bill or note of one who indorsed it before delivery for the purpose of backing the drawer or the maker, although there was great conflict as to the nature of the liability. In some states such backer was held as a maker or drawer, in others as an indorser, and in others as a guarantor.⁴⁴ Section 64-1-2 as enacted makes such a signer an indorser liable to the payee except when the instrument is payable to the order of the maker or drawer or is payable to bearer. There is no reason in the nature of things why a backer for the accommodation of the acceptor should not be liable to the drawer when the drawer is the payee, and such is the law on the continent of Europe.

Professor Ames while commending section 64 as being an other-

¹ Because of the great diversity in the sectional numbering of the act as adopted in the different states, it has been thought best to use in this article the numbers as they appear in the act as recommended by the Commissioners on Uniform Laws. The corresponding sections of the act in the various states can be found in the Table in Brannan's Negotiable Instruments Law, p. xxii.

⁴³ Section 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

⁴⁴ See 1 Ames, Cases on Bills and Notes, 269, n. 1.

wise excellent piece of codification suggested the amendments above set out ⁴⁵ and illustrated the necessity thereof by this example:

"If A. makes a note payable to X. or order, gets B. to indorse it and delivers it to X. in exchange for goods, B. is liable, under this section, to X. and all subsequent parties. If, however, A. accepts a bill drawn by X., payable to the order of X., gets B. to indorse it, and delivers it, as before, to X. for goods purchased, B., under this section, is not liable to X., but only to subsequent holders. And yet the business relations of A., B., and X. are obviously identical in the two cases. In each X. sells to A. on credit, trusting to the responsibility of both A., the buyer, and B., the surety." ⁴⁶

Seventh. The first clause of section 70 ⁴⁷ should be amended so as to read as follows:

"Presentment for payment is not necessary, *except in the case of bank notes and certificates of deposit*, in order to charge the person primarily liable on the instrument."

Section 70 as enacted was, of course, intended to apply to the maker of a note and the acceptor of a bill, and its effect upon certificates of deposits and bank notes was evidently overlooked. Under this section as it now is, the Statute of Limitations would begin to run against certificates of deposit and bank notes immediately upon their issue. The absurdity of this result is evident as to bank notes which are intended to circulate indefinitely. As to certificates of deposit, the weight of authority is that they must be presented to charge the bank, ⁴⁸ while four states hold that presentment is not necessary. ⁴⁹

⁴⁵ The words "or bearer" after "drawer" in the first paragraph of the amended section have been added by the writer to cover the case of a bill drawn payable to bearer and accepted before negotiation by the drawer. In such case the drawer as bearer should be able to hold the backer for the acceptor.

⁴⁶ For further discussion of this point see Brannan, *Negotiable Instruments Law*, 2 ed., pp. 171, 187, 198, 209, 262, 263, 264.

⁴⁷ Section 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument.

⁴⁸ *Hillsinger v. Georgia Railroad Bank*, 108 Ga. 357, 33 S. E. 985 (1899); *Brown v.*

⁴⁹ *Brummagim v. Tallant*, 29 Cal. 503 (1866); *Tripp v. Curtenius*, 36 Mich. 494 (1877); *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910 (1887) (but the right to sue a bank on a general deposit does not accrue nor the Statute of Limitations begin to run until demand of payment unless demand is in some way dispensed with, *Branch v. Dawson*, 33 Minn. 399, 23 N. W. 552 (1885)); *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705 (1887).

No one would deny that a demand is necessary to set the Statute of Limitations running against an ordinary deposit in a bank. The mercantile world regards certificates of deposit in the same way, and by the custom of merchants the holder of such a certificate is a depositor who like the ordinary depositor may leave the money in the bank indefinitely without being barred by the statute.

Eighth. For the same reasons that require the amendment of section 70, section 53⁵⁰ should be amended so as to read as follows:

"Where an instrument payable on demand, *other than bank notes and certificates of deposit*, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

If an instrument is not due without demand so as to charge the maker, no passage of time before demand should be regarded as a dishonor so as to make a transferee before demand subject to equities.

Ninth. The last paragraph of section 71⁵¹ should be amended so as to read:

"Where it is payable on demand, presentment must be made within a reasonable time *after its indorsement in order to charge the indorser, and in case of a bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer.*"

Why section 71 departs in this paragraph from the provisions of the Bills of Exchange Act, which are the same as the suggested

McElroy, 52 Ind. 404 (1876); *Elliott v. State Bank*, 128 Ia. 275, 103 N. W. 777 (1905) (overruling *Mereness v. First Nat. Bank*, 112 Ia. 11, 83 N. W. 711 (1900)); *Fells Point Savings Institution v. Weedon*, 18 Md. 320 (1862); *Shute v. Pacific Nat. Bank*, 136 Mass. 487 (1884); *Howell v. Adams*, 68 N. Y. 314 (1877); *Cottle v. Marine Bank*, 166 N. Y. 53, 58, 59 N. E. 736, 737 (1901) (so also as to certificates of deposit issued by an individual, *Smiley v. Fry*, 100 N. Y. 262, 3 N. E. 186 (1885)); *Bank of Commerce v. Harrison*, 11 N. M. 50, 66 Pac. 460 (1901); *McGough v. Jamison*, 107 Pa. St. 336 (1884); *Tobin v. McKinney*, 15 S. D. 257, 88 N. W. 572 (1901); *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377 (1867); *Riddle v. First National Bank*, 27 Fed. 503 (1886).

⁵⁰ Section 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

⁵¹ Section 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

amendment, is not apparent. Probably in the effort at condensation the effect of the condensed statement was overlooked. At any rate, the consequences are most undesirable. Following the plain language of section 71 the Supreme Court of Wisconsin held ⁵² that delay, although unreasonable, between the date of a demand draft and its negotiation to the plaintiff was immaterial if the draft was presented for payment within a reasonable time after its negotiation to the plaintiff. If, for example, in a jurisdiction where an action on such an instrument is barred in six years, the payee of a bill of exchange payable on demand should indorse it to A. and A. should hold it without presentment over five years, any court would say that A. had held the bill an unreasonable time and that he could not recover against the drawer or indorsers. But if, after holding the bill so long, A. should negotiate it to B. the latter could hold the drawer and indorsers, if he presented the bill for payment within a reasonable time after he received it even though this might be just before the expiration of the six years. Such a result would be unjust and contrary to business usage and should be avoided by amendment of the section.

Again, section 185 defines a check to be a bill of exchange drawn on a bank payable on demand and provides that, except as otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand shall apply to a check. Section 186 provides that a check must be presented for payment a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. If the loss, for instance, should be fifty per cent of the amount of the check, the drawer, by the combined effects of sections 185 and 186 would be discharged to the extent of fifty per cent. But section 186 makes no exception in favor of the indorser and does not discharge him to the extent of the loss caused by the delay. It would be most inequitable if the drawer is discharged to the extent of fifty per cent and the indorser not at all. It may be argued that the indorser would be discharged under section 120-3 which provides that a person secondarily liable on the instrument is discharged "by the discharge of a prior party." There is some doubt, however, whether the partial discharge of a prior party would come within

⁵² *Columbian Banking Co. v. Bowen*, 134 Wis. 218, 114 N. W. 451 (1908).

the section, and whether the indorser would be discharged either wholly or in part. At all events, the rights of the indorser ought not to be jeopardized when the doubt can be cleared up by the simple amendment above suggested.

Tenth. Section 85⁵³ should be amended so as to read:

"Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon *Saturday*, Sunday or a holiday, the instrument is payable on the next succeeding business day *which is not a Saturday*. Instruments payable on demand may at the option of the holder be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

The third sentence of section 85 presents the anomaly that while an instrument falling due on Saturday must be presented on Monday in order to charge drawer and indorsers, yet if the instrument is payable at a special place and the person primarily liable is able and willing to pay it there at maturity, it must by the provisions of section 70⁵⁴ be presented on Saturday in order to charge the parties liable for such payment with interest after Saturday. Section 85 presents also the further anomaly that if an instrument payable on Saturday is presented on that day and payment is refused, the instrument is dishonored by the maker so far as concerns his liability but not as to the indorser, to charge whom the instrument must be again presented on Monday. The maker could be held on Saturday, although as to the indorsers the note has not been dishonored.

Another question of serious moment to collecting banks also arises under section 85. Suppose that presentment on Saturday would have secured payment but the instrument is dishonored

⁵³ Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday

⁵⁴ Section 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

when presented on Monday because of bankruptcy or other cause, is not the collecting bank guilty of negligence and liable therefor to its correspondent? In an article by Professor Williston⁵⁵ this question is discussed in the light of an instance in which the question of interest after Saturday became of importance, and which led to an act of the Massachusetts Legislature amending section 85 in the manner above suggested.⁵⁶

Eleventh. Section 119⁵⁷ should be amended so as to read:

"A negotiable instrument is discharged:

"1. By payment in due course by or on behalf of the *person primarily liable*;

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

"4. When the *person primarily liable* becomes the holder of the instrument at or after maturity in his own right."

The changes in this section consist in striking out paragraph (4) from the original section, in changing the number of paragraph (5) to (4), and in substituting the words "primarily liable" for "principal debtor" in paragraphs (1) and (4).

Paragraph (4) of section 119 as it now stands is contrary to the law and mischievous. Payment of a simple contract debt before

⁵⁵ 23 Harv. L. Rev. 603.

⁵⁶ A proviso was also added by the Massachusetts Legislation as follows: "provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day." It is doubtful whether the proviso should be included in an amendment of section 85, since the question of negligence of a collecting agent may be affected by local usage and the circumstances of the case, and for this reason the proviso has been omitted from the amendment above suggested.

⁵⁷ Section 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which will discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

maturity discharges the claim not only as to the creditor, but as to a subsequent assignee of the debt. But payment of a negotiable instrument before maturity has never been held a discharge of the instrument as against a subsequent holder in due course. Yet this paragraph makes such payment a discharge.⁵⁸ The change in the words "principal debtor" should be made to eliminate certain questions of suretyship from section 119. When the maker of a note whether principal or surety as between himself and an indorser pays or otherwise acquires the note at maturity, it is discharged. If the indorser is the principal debtor, the maker can recover from him but not on the note. But if an indorser who is, as between himself and the maker, the principal debtor, pays the note at maturity, then paragraph (2) covers the case.

Twelfth. Section 120⁵⁹ should be amended so as to read as follows:

"Section 120. A *party to a negotiable instrument* is discharged:

"(1) By any act which discharges the instrument;

"(2) By the intentional cancellation of his signature by the holder;

"(3) By a valid tender of payment made by a prior party."

The substitution of the words "party to a negotiable instrument" for "person secondarily liable on the instrument" is made in order to distinguish between the discharge of the instrument as provided for in section 119 and the discharge of a party whether primarily or secondarily liable, leaving the instrument otherwise in force.

Paragraph (3) is eliminated because there are many cases in which, as pointed out by Professor Ames, the discharge of a prior party does not discharge one secondarily liable.⁶⁰ Paragraphs (5)

⁵⁸ See fuller discussion of this point, Brannan, *Negotiable Instruments Law*, 2 ed., 174, 189, 200, 274-276, 294.

⁵⁹ Section 120. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved.

⁶⁰ Brannan, *Negotiable Instruments Law*, 2 ed., 276-278, 294, 295.

and (6) are stricken out because the Negotiable Instruments Law could not and does not attempt to state fully all of the cases in which the law of suretyship may lead to changes in the liability of parties to bills and notes. As it is impossible to cover the subject of suretyship in the act, it is better to omit paragraphs (5) and (6) and to retain paragraph (4) as paragraph (3) in the proposed amendment, leaving the subject to be dealt with in each jurisdiction according to the law of suretyship in such jurisdiction.

Sections 119 and 120 have already had an unfortunate effect in reversing established and just rules of suretyship as applied to negotiable bills and notes and have prevented the uniformity which it was the object of the act to secure. Parol evidence has long been admitted in England and almost everywhere in this country to show that the holder when he took an instrument, on which one of two or more joint makers or acceptors was a surety, knew that fact, and it has been held in such jurisdictions that such holder could not give a binding extension of time to the surety or impair his rights in certain other ways without discharging the principal, and the same rule was applied to a sole maker or an acceptor who was known to have signed for the accommodation of the drawer or payee-indorser. In most jurisdictions also the same effect was given to the knowledge of the suretyship relation even though the holder acquired the knowledge after he took the instrument.⁶¹ But the construction put by the supreme courts of six states upon sections 119 and 120 of the act completely reverses this equitable and almost universal rule, such courts having held that an extension of time given by a holder to a maker with knowledge of the fact that the maker was a surety did not discharge the surety; also that time given to an accommodated payee by a holder with knowledge of the accommodation did not discharge the accommodating maker.⁶²

⁶¹ See Professor Hening in 59 U. of P. Law Rev. 532 *et seq.* for collection of cases in England and America.

⁶² *Fritts v. Kirchdorfer*, 136 Ky. 643, 650, 124 S. W. 882 (1910) (but see *Farmers' Bank v. Wickliffe*, 134 Ky. 627, 121 S. W. 498 (1909)); *Vanderford v. Farmers' & Mechanics' Bank*, 105 Md. 164, 66 Atl. 47 (1907); *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679 (1912); *National Citizens' Bank v. Toplitz*, 81 N. Y. App. Div. 593, affirmed on another ground, 178 N. Y. 464, 71 N. E. 1 (1904) (but in *Building & Engineering Co. v. Northern Bank*, 99 N. E. 1044 (Nov., 1912), the Court of Appeals of New York, without passing on the question whether under the Negotiable Instruments Law and in an action at law the accommodating maker of a note must

One supreme court has, however, held that sections 119 and 120 apply only to holders in due course, and that a payee with notice that a maker was a surety discharged the surety by giving time to the principal maker without the consent of the surety.⁶³

It has been argued by the writer in another place⁶⁴ that sections 119 and 120 can be so construed as to avoid upsetting the established doctrines of suretyship, and in this he finds himself in company with several other writers.⁶⁵ But the course of decision has gone so far in one direction that even if other courts should take the contrary view from the courts which have already spoken, uniformity cannot be had. Nor can uniformity be obtained if all courts hereafter construing sections 119 and 120 should follow the six supreme courts which have treated the act as abrogating the former doctrine. In the first place, Iowa is at variance with the other courts, and in the second place, several states did not adopt sections 119 and 120 in the form recommended by the commissioners.⁶⁶

Thirteenth. Section 137⁶⁷ should be amended so as to read as follows:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses *after the expiration of* twenty-four hours after such delivery or such *longer* period as the holder shall allow, to return the bill accepted or non-accepted, to the holder, he will be deemed to have *converted the same and shall be liable in damages for the amount of the bill.*"

absolutely be treated as primarily liable thereon and the accommodated indorser as secondarily liable, held, that, even assuming such to be the case, the court is not prevented in an action in equity from determining and enforcing the rights of the parties as the same are found as a matter of fact); *Richards v. Market Exchange Bank*, 81 Oh. St. 348, 90 N. E. 1000 (1910); *Cellars v. Meachem*, 49 Or. 186, 89 Pac. 426 (1907); *Hunter v. Harris*, 127 Pac. 786 (Or.), *semble*; *Wolstenholme v. Smith*, 34 Utah 300, 97 Pac. 329 (1908); *Bradley Engineering Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910).

⁶³ *Fullerton Lumber Co. v. Snouffer*, 139 Ia. 176, 117 N. W. 50 (1908).

⁶⁴ Brannan, *Negotiable Instruments Law*, 2 ed., 117.

⁶⁵ Professor Street, 11 Am. Law Notes, 105; Professor McGehee, 12 Am. Law Notes, 122; Hon. Amasa M. Eaton, Reports Am. Bar Association, 1907, p. 1164; H. H. McMahon, Esq., 8 Ohio L. Rep., 25.

⁶⁶ Wisconsin, Kansas, Illinois. Brannan, *Negotiable Instruments Law*, 2 ed., 120, 158; Professor Henning in 59 U. of P. Law Rev. 540-542.

⁶⁷ Section 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

By the custom of merchants and the common law, the drawee was entitled to twenty-four hours in which to decide whether to accept a bill or not. It could hardly have been the purpose of the draftsman of the act to allow the holder to shorten this time, and the word "other" was without doubt inadvertently used and should be changed for "longer."

The provision that a destruction or refusal to return the bill shall be deemed an acceptance makes a contract out of a tort. No such provision is found in the Bills of Exchange Act and the doctrine was expressly rejected in *Jeune v. Ward*.⁶⁸

Aside from the unscientific character of the provision, it is unjust to the drawer and indorsers of the bill. If the bill is treated as accepted, it is not dishonored, and notice of dishonor cannot be given to the drawer and indorsers. But such an act as the destruction of the bill or refusal to return it shows clearly that the drawee does not intend to pay it. The drawer in ignorance of an act which indicates that his funds in the drawee's hands are in peril can take no steps to protect himself, and even if he is informed of the facts, what can he do since the bill is accepted?

The section has been condemned not only by Professor Ames, but also by Mr. Cohen, Q. C., of the English Bar and by Mr. McKeehan.⁶⁹

There is still another objection to the section. What is meant by a "refusal to return the bill within twenty-four hours"? Is the mere failure to return it a refusal even though the holder has not called for it? Must the drawee see that the bill gets back to the holder before the expiration of the twenty-four hours or be held to have accepted it?*

The section is a substantial reenactment of a New York statute under which it was held that mere retention by the drawee was not an acceptance; that the acts of the drawee must be such as amount to a conversion of the bill. And the same result was reached in the other states which had adopted similar statutes.⁷⁰

But a demand for the return of the bill could certainly not be made within the twenty-four hours which the drawee was entitled

⁶⁸ 1 B. & Ald. 653.

⁶⁹ Brannan, *Negotiable Instruments Law*, 2 ed., 166, 215, 282-284, 292.

⁷⁰ *Matteson v. Moulton*, 79 N. Y. 627; *Dickinson v. Marsh*, 57 Mo. App. 566 (1894); *St. Louis & S. W. Ry. v. James*, 78 Ark. 490, 95 S. W. 804 (1906).

to retain it, and if the demand is made after the expiration of the twenty-four hours and the drawee then refuses to return, how can he be said "to refuse *within* twenty-four hours after such delivery?"

If he is not bound to return so as to make his refusal an acceptance without a demand, and if a demand cannot be made until after twenty-four hours, the provision seems to be incapable of operation. The change from "within twenty-four hours" to "after the expiration of twenty-four hours" is made in the amendment in order to cure this difficulty. The Supreme Court of Pennsylvania has however held that under section 137 the presentation for acceptance is in itself a demand for acceptance which implies a demand for the return of the bill if it is not accepted, and that the mere failure to return the bill within twenty-four hours is an acceptance.⁷¹ The court erroneously, as it is conceived,⁷² applied the rule to a check, and held that the drawee bank became liable on a check which it had refused to pay, because, having given the check to a notary public to protest, he failed to return it in time for it to be returned to the holder within twenty-four hours from its presentation — a most unjust result.

In *State Bank v. Weiss*,⁷³ also, the court applied to a check the rule of this section that a drawee will be deemed to have accepted a bill which he does not return within twenty-four hours after its delivery for acceptance.

But the Pennsylvania case was followed by an act of the legislature amending section 137 by adding the words:

"The mere detention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks."⁷⁴

So Pennsylvania, like the other states which have adopted the act, is again in the dilemma above indicated, and in Wisconsin the statute itself provides that the "mere retention of the bill is not an acceptance."

It is submitted that uniformity and scientific accuracy as well

⁷¹ *Wisner v. First National Bank*, 220 Pa. St. 21, 68 Atl. 955 (1908).

⁷² *Brannan*, *Negotiable Instruments Law*, 2 ed., 135, 136.

⁷³ 46 N. Y. Misc. 93, 91 N. Y. Supp. 276 (1904).

⁷⁴ Laws of 1909, Act 169, April 27, 1909.

as justice to drawer and indorser require the amendment of section 137 in the manner suggested.

Fourteenth. Section 186 ⁷⁵ should be amended so as to read as follows:

"A check must be presented for payment within a reasonable time after its issue *and notice of dishonor given to the drawer, as provided for in the case of bills of exchange*, or the drawer will be discharged to the extent of the loss caused by the delay."

Under section 89 ⁷⁶ the drawer of a bill of exchange is absolutely discharged by failure to give him notice of dishonor even though he suffers no loss by such failure to give him notice. Section 185 provides that "except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

Now section 186 declares what shall be the effect on the liability of the drawer of failure to present the check for payment within a reasonable time, but says nothing as to the effect of failure to give notice of dishonor. Since no separate provision is made for this contingency as to a check, the provision of section 89 controls, and the drawer of the check will be absolutely discharged, although the delay has caused him no loss. This is contrary to the common law.⁷⁷

The view here taken of the effect of section 89 is supported by several cases in the New York Appellate Division, where it has been held that under section 89 ⁷⁸ notice of dishonor must be alleged in a complaint against the drawer of a check; ⁷⁹ that judgment against the drawer of a check cannot be sustained in the absence of proof

⁷⁵ Section 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

⁷⁶ Section 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

⁷⁷ *Clark v. National Bank*, 2 MacArthur (D. C.) 249 (1875); *Griffin v. Kemp*, 46 Ind. 172 (1874); *Gregg v. George*, 16 Kan. 546 (1876); *Stewart v. Smith*, 17 Oh. St. 82 (1866); *Purcell v. Allemong*, 22 Gratt. (Va.) 739 (1872); *In re Brown*, 2 Story 502 (1843). See Daniel, *Negotiable Instruments*, 5 ed., sec. 1587.

⁷⁸ N. Y., Laws of 1897, c. 612, sec. 160.

⁷⁹ *Ewald v. Faulhaber Stable Co.*, 55 N. Y. Misc. 275, 105 N. Y. Supp. 114 (1907).

Dis
def
for
as for

of notice of dishonor to the drawer,⁸⁰ and that the drawer of a check is discharged by failure to give him notice of dishonor, the bank having refused to pay because it was short of funds and subsequently proving to be insolvent.⁸¹

The omission of a provision as to notice of dishonor of a check was an evident oversight which should be remedied, as was done in the Illinois act by the insertion of the suggested clause.

J. D. Brannan.

HARVARD LAW SCHOOL.

⁸⁰ *Kuflick v. Glasser*, 114 N. Y. Supp. 870 (1909).

⁸¹ *Bacigalupo v. Parrilli*, 112 N. Y. Supp. 1040 (1908).

THE CONSERVATION OF WATER-POWERS.

“**C**ONSERVATION” is a much used, a much abused, term. In its name, many salutary reforms have been advocated; some have been accomplished. In its name, also, have been committed many sins, both of commission and of omission. Some men who arrogate to themselves the title of “conservationists” are indictable under the charge of misbranding. Many, whose views are attacked as antagonistic to public interest, as selfish and non-progressive and as hostile to the policy of conservation, are, nevertheless, sane and discriminating advocates of a wise public policy.

The question of conservation, as the term is here used, has to do with the policy, not only of the governments, federal and state, but also of the people at large, with regard to those resources, useful to man, which are supplied by nature in a form easily adaptable to immediate utilization, and particularly with regard to those natural resources, not uniformly distributed, which are limited in extent or in quantity. Among such natural resources are the minerals in the earth, the forests growing upon the earth, and the waters flowing over the earth. Whether applied to any or all of these, a policy of conservation should, manifestly, be directed neither to a locking up or withdrawal from use, on the one hand, nor to an indiscriminate or wasteful utilization, upon the other hand. Economy, in its best sense, should prevail, but an economy which has regard for both the present and the coming generations. These natural resources are placed by nature for the use of man, the man of to-day and the man of the future. Where present and future interests conflict, those of the present are paramount. It is not justifiable unduly to place burdens and restrictions upon the present generation out of regard for those to come after us, nor unduly, by present extravagance, to impose unnecessary burdens upon the future. More than that, neither desires for the present nor for the future should be made the justification or pretext for measures in conflict with the fundamental laws of personal and property rights which are, under our constitutional government, the safeguards of our free institutions.

Conservation, then, should denote the policy of the economical utilization of these natural resources, and of the utmost protection, within the law, of such economy, consistent with the needs of present and of future generations.

IMPORTANCE OF WATER-POWER CONSERVATION.

The two great, natural sources of energy available are coal deposits and water-powers.¹ The total stationary power used in the United States is estimated at over thirty million horse-powers.² The total developed water power is about six million horse-powers; and of the latter, about three-quarters is commercial power, that is, power produced for sale. The amount of water power now economically capable of development is not less than twenty-five million horse-powers, including that already developed,³ and is by some authorities estimated as high as thirty-five million horse-powers.⁴ The total potential water power of the United States is estimated at two hundred million horse-powers.⁵ The present annual coal consumption in the United States is over five hundred million tons, and at the present rate of consumption and annual increase, the supply of anthracite coal will be exhausted before the end of the present century. The known supply of bituminous coal, while sufficient for six or seven centuries to come, assuming that the present rate of consumption continues, is in fact limited, and its cost to the consumer gradually increases as the supply diminishes.⁶ While the cost of developing water power and the hazards of the business are great, the development of electrical transmission of energy has made water-power development feasible as a business proposition, as against the cost of steam power, to

¹ For the purpose of this discussion, gas and oil are assumed as part of coal deposits.

² See the report of the United States Commissioner of Corporations on "Water-Power Development in the United States," issued by the Department of Commerce and Labor, March 14, 1912.

³ Report of Commissioner of Corporations, *supra*; Hearings on the Development and Control of Water Power, Senate Document 274, 62d Congress, 2d Session, pp. 11, 14, 211, 273.

⁴ Senate Document 274, 62d Congress, 2d Session, pp. 11, 14, 32, 211, 272.

⁵ Senate Document 274, 62d Congress, 2d Session, p. 275.

⁶ H. Sinclair Putnam in Proceedings of the Conference of Governors, 1908, p. 297; M. O. Leighton of United States Geological Survey, Annals of the American Academy of Political and Social Science, May, 1909, p. 54.

the extent that the amount of water power which is yet undeveloped, but which could be economically developed at the present time, amounts, as shown above, to about twenty million horse-powers. As fuel grows scarcer and as the science of electrical transmission progresses, further water-powers, now merely potential, will be available for the market. It is computed that under average conditions about fifteen tons of coal are required to generate one horse-power a year.⁷ The use, therefore, of the twenty million horse-powers of water power now unused but economically available, would reduce the annual coal consumption by approximately three hundred million tons; that is, by more than fifty per cent. Thus by the extended utilization of one source of energy, water power, two objects of conservation would be accomplished, — the utilization, without loss, of one natural resource, and the saving from loss of another.

CONSERVATION OF WATER-POWERS MEANS EXTENSION OF THEIR USE.

Herein lies the peculiar adaptability of the policy of conservation to the use of water-powers. The three natural resources referred to represent fairly three distinct classes, or kinds, differing in respect of their quality of persistence. The mineral supply, in this case the coal deposits, is limited by its fixed and approximately computable quantity. In the case of timber, while the present supply is limited, it, nevertheless, is naturally renewed. Indeed, the non-use of the quantity ripe for use is itself a waste; but, comparatively speaking, timber is a recurring, even if not a constant and undiminishing, natural resource. But water power is constant. The supply is not diminished by use, for in itself it consists in the development and use of two constant factors, (1) supply of water and (2) a head and fall, through which the weight of the water creates energy developable for practical use.

Every ton of coal used is forever lost as a source of energy. The use of every fifteen tons of coal means that the natural sources of energy have been forever diminished by an amount equivalent to the use of one horse-power for an entire year. To the extent that any quantity of coal is used up for energy before the time when its

⁷ Senate Document 274, pp. 26, 32.

use is necessary, in place of an equal amount of energy from water power, such use constitutes a waste of energy. On the other hand, the non-use of any quantity of water power, through lack of development and of use of water-powers, the development of which is commercially feasible, means a waste of energy which can never be recouped. So far as such waste of water-power energy is accompanied by the further waste of coal energy, which the water-power energy might otherwise replace, there results a double and continuous loss or waste of the energy available from natural resources and, therefore, of these two natural resources themselves. The primary object of the conservation of natural resources, which is to preserve them from waste, is manifestly doubly opposed by any policy which defeats or postpones the development and utilization of water-power energy.

Because it is inexhaustible and because its use replaces that of another and exhaustible natural source of energy, water power is the most potent of all natural resources, as a subject and agency of conservation. In the case of a limited, exhaustible, and rapidly diminishing supply of a natural resource, such as that of coal deposits, the forces of conservation should be directed to the prevention of use, as far as consistently possible. But the correct view of conservation inevitably leads to the demand that, in the case of water-powers, there shall be encouraged and promoted the greatest and most immediate use possible.

What, then, should be the policy and attitude of our state and national legislatures and of the people as a whole with regard to the conservation of water-powers, which, as we have seen, means their utilization, immediately and universally, and to the greatest extent possible, consistent with the fundamental constitutional law governing the rights and obligations between the federal and state governments and also between the people at large, represented by these governments, and individuals?

THE GOVERNMENT AS SOVEREIGN AND AS PROPRIETOR.

As applied to water-powers, a policy of reservation is obviously repugnant to conservation, for the latter manifestly means immediate utilization to the greatest extent possible. Again, legislative measures, national and state, while directed to promote present

and general utilization, should, in their purpose and effect, be made consistent with the fundamental law of private property rights. They should also be in harmony with the established rights and authority of the federal and state governments. A default in either of these particulars signifies a misapprehension of the real meaning and purpose of conservation, and involves a departure from the principles of that wise and progressive policy. Any unnecessary obstacle set up against the ready development and use of water-powers indicates a policy of reservation instead of utilization. A disregard, moreover, of the rights of individuals by either the federal or state governments, or of the rights of states by the federal government, leads to an unwarranted encroachment, under the guise of serving a paramount public interest, upon the authority and rights of the states, or upon the property rights of individuals, and makes conservation a mere pretext for confiscation.

From the failure to recognize these principles of conservation peculiarly applicable to water-powers, have arisen many mistakes in legislation heretofore enacted ostensibly in the interests of conservation. Such legislation affects two classes of property, the one where the element of proprietorship in the government is absent, and where its only rights are those arising by virtue of its sovereign authority to regulate commerce; the other where the government, in addition to its limited rights as sovereign, holds the water-power lands and rights as proprietor. Obviously the rights, obligations and authority of a purely sovereign power of control must be distinguished from those where the *ius publicum* and the *ius privatum* are combined. To the latter class belongs the control by the federal government of water-powers which are part of the public domain; also of those appurtenant to lands and rights which are acquired, by purchase or expropriation, by a government, national or state, for a use authorized in the public interest. To the former class belongs the control of water-powers which, under the established law, are a part of the riparian land, the title to which is vested in private ownership; also, as against the federal government, where the ownership or power of control is vested in the states.

With respect to these classes of power of control, let us examine the present legislative policy. First, as to water-powers on the public domain.

WATER-POWERS ON THE PUBLIC DOMAIN.

As to lands upon the public domain, the federal government is both sovereign and proprietor. The question of its control of water-powers, which are part of the public domain, is, therefore, one of policy rather than one of constitutional law. The present avowed policy, however, is one of delay, hindrance, and reservation rather than one of encouragement to use. The public domain is mostly confined to the far western states, where, particularly in the mountainous regions, large and valuable undeveloped water-powers have long lain dormant; but their development is now economically feasible for markets creating a demand. They are potentially the source of stupendous industrial growth. Water-power development, however, involves immense expense in construction and maintenance of water-power and electrical plants and of transmission lines. Large capital investment is necessary. Capital is furnished, as any other commodity, upon terms commensurate with the hazards of the enterprise, and with the degree of certainty of tenure and of the probability of the ultimate return of the actual investment with fair profits thereon. As the government owns the water-powers on the public domain, it is proper that a charge, fair under all the circumstances, should be reserved for the right to utilize them. But the uncertainty of tenure and the onerous conditions imposed in grants of water-power rights upon the public domain have prevented any considerable development. A company or an individual desiring to develop water power upon the public domain must first appropriate the water under the laws of the state where the power site is situated. This provision recognizes the laws of those states in which most of the public domain is situated, and where the common law of riparian rights has been replaced or modified by that of prior appropriation. It recognizes, also, the rule, established as to all states, that, as between the individual and the government, federal or state, the individual rights are established and enforced according to the property law of the state wherein the land is situated, subject always to the authority of the Congress to regulate commerce, that is, in the case of waterways, to regulate navigation.⁸ Before development one must,

⁸ Act of July 26, 1866, U. S. Rev. Stat., sec. 2339; Act of July 9, 1870, U. S. Rev. Stat., sec. 2340; Act of March 3, 1877 (Desert Land Act), 19 U. S. Stat. at Large,

upon application, obtain the permission of the Secretary of Agriculture or the Secretary of the Interior, to use such portion of the public domain as may be necessary for a dam, power plant, and transmission lines; and such permit is revocable at the will of such department and subject to such changes and conditions as it may, from time to time, see fit to impose. The land still remains subject to entry under the homestead or mining laws and such entry may effect a revocation of the permit. If the jurisdiction over the land in question is transferred from one department to another, the permit is thereby automatically revoked. There is no provision for uniform rules, to insure certainty or consistency in the privileges conferred or in the obligations imposed.⁹ This policy of legislative discouragement evolved into an avowed legislative policy of complete reservation, when, in 1910, the Congress authorized the President, in his discretion, to withdraw from settlement, location, sale, or entry, any of the public lands and to reserve the same for water-power sites or other enumerated uses until such withdrawals or reservations should be revoked.¹⁰ Under the authority thus granted there have been withdrawn from location or use most of the desirable water-power sites upon the public domain. The amount of water power now undeveloped and capable of development in the national forests is estimated at over thirteen million horse-powers, as against about three hundred thousand horse-powers now developed. This does not include a very large, but less proportionate, amount of undeveloped water power on other parts of the public domain.¹¹

It is manifest that a proper conservation policy demands that all these water-powers be available for immediate use and that a definite, consistent policy be adopted with regard to their control. Safeguards may be provided against purely speculative entries and against monopoly. At the same time, the greatest encouragement should be given to capital for investment. The chances of any

377; *St. Anthony Falls Water-Power Co. v. Water Commissioners*, 168 U. S. 349, 365 (1897).

⁹ Act of February 26, 1897, 29 U. S. Stat. at Large, 599; Act of June 4, 1897, 30 U. S. Stat. at Large, 34-36; Act of February 15, 1901, 31 U. S. Stat. at Large, 790; Act of February 1, 1905, 33 U. S. Stat. at Large, 628.

¹⁰ Act of June 25, 1910, 36 U. S. Stat. at Large, 847.

¹¹ Report of Commissioner of Corporations on Water-Power Development in the United States, March 14, 1912, pp. 194-195.

automatic revocation of permits should be eliminated. The power of arbitrary revocation should not be reserved. If a time limit is fixed, it should be for a long period, not less than fifty years. But any fixed time limit, without provisions for renewal upon definite terms, is a great obstacle to investment. Investors are reasonably entitled to be assured of a return of their investment with an annual profit commensurate with the hazards incurred. If, at the end of a fixed period, they are to forfeit their plant, or be subject to a renewal of their permit upon terms not agreed upon in advance, or be compelled to turn over their plant upon the payment merely of its then cost of reproduction, their service charges must be increased so that at the expiration of the permit they shall have received from the consumers not only interest and profits, but also the entire amount originally invested in structures, renewals, and improvements. Assurances of continuity of tenure, either by provision for renewals of permits for definite terms or by perpetual permits, subject to specific rates for rentals or charges measured by the success of the enterprise as evidenced by profits, would establish a tangible and business-like basis for investment. A permit should be revocable only for cause and after an adjudication. Rates to consumers should be subject to the control of the various states in which the product is supplied, thus making the control of rates subject to the same rules as are applicable to other similar public-service enterprises.

These are simple problems and can be easily and wisely solved if they are approached in the true conservation spirit. The present obstacle to their solution is the too prevalent idea that proper regard for the interests of private investors is a heresy of conservation and that the reservation to the government of the very utmost possible, of profit and of advantage, is of the essence of conservation.

WATER POWER AT GOVERNMENT NAVIGATION DAMS.

Under its constitutional power to regulate commerce the Congress has paramount control of navigation in the navigable streams and waters of the United States.¹² Under this power the federal

¹² *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1 (1824); *The Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443 (1851).

government, with the authority of the Congress, has constructed and maintains on rivers, at various points in the United States, navigation dams with locks and power appliances necessary for their operation. For such purpose it sometimes purchases or expropriates the necessary riparian lands and rights, and thereby becomes the proprietor, not only of the structures and appurtenant appliances, but also of the riparian land and rights included in, or affected by, the structures and by their operation, and hence is owner of the water power developed at such a dam. It has no power or authority to construct or operate a dam for water-power purposes, except for its own direct use. The government could not, either as proprietor or sovereign, erect and operate a dam, primarily for water power, and sell or lease, either the structures and water-power rights or the power produced. Where, however, it owns water power created incidentally to its authorized navigation improvements, it may sell or lease the surplus power, not required for its own use, and upon such terms as it may choose to make with any purchaser or lessee. The right to make terms and conditions for such use of the water power does not rest upon the fact that the water power is incidental to a navigation improvement; neither does it rest upon the fact that the government has control of the river for the purposes of navigation. This right is based expressly upon the fact that the government by virtue of its acquirement of the riparian rights, holds a proprietary interest in the water power in question, and that, as such proprietor, it may deal as any holder of a proprietary interest.¹³

The federal government has a certain power, arising by virtue of its sovereign power under the commerce clause, of control over navigation. This sovereign power is limited. By virtue of that power alone it has no ownership or control over water-powers as such, whether they be developed at navigation dams or otherwise. It may acquire further rights, either of ownership or of control, by attaching to its sovereign right certain proprietary rights; and it is the extent of its acquirement of such proprietary rights which, mainly, determines the relations and obligations between the government and the riparian. In the foregoing I have assumed that when the government entered upon the construction of a naviga-

¹³ *Green Bay Co. v. The Patten Paper Co.*, 172 U. S. 58, 173 U. S. 179 (1899).

tion dam, it acquired, not only sufficient riparian land for its dam abutments and other rights within the bed, but also the riparian water-power rights affected by the dam; that is, that it became, by purchase or otherwise, through private or state grants, or both, proprietor of the water power itself. Such were the circumstances in the case of the Green Bay Co. v. Patten Paper Co.

To cite that case, however, as authority for the claim that, because the navigation dam has been constructed by the government under its constitutional power of control over navigation, it thereby acquires either ownership or control over all the water power developed at the navigation dam, is to lose sight of many obvious and controlling distinctions. It is not necessary here to decide the question, which is sometimes disputed, whether the government has the right to condemn, or even to acquire by purchase, any water-power rights beyond those which are reasonably necessary to enable it to construct and operate the navigation dam. That it may do so, at least to the extent required for navigation purposes, is manifest. That it has no ownership or control of any amount of water power beyond the quantity required for such navigation purposes, except through an acquirement for which compensation is made, is equally manifest. The mere fact that the surplus water power is developed by the navigation dam does not change the proprietary right to such water power from the riparian to the sovereign. The water power is not "created" by the dam. It was created by nature when the quantity of flow and the head and fall were made a natural incident to the riparian real estate. Its ownership in the riparian, established by nature, was confirmed by the law of the land which vested it in him as a property right *iure naturæ*. Its incidental development through a construction by one who is not its owner does not change its ownership, any more than would the fetching to market by one man of goods owned by another.

It is consistent with its constitutional power of navigation control, that the government should have or acquire the right to occupy the bed of the stream with its navigation dam, the right thereby to develop and use such an amount of water power as is necessary to operate the dam for navigation purposes, the right to raise and lower the waters in the pool above the dam in the operation of the locks, the right to acquire land for dam abutments, flowage and other necessary purposes, and that, to the extent reasonably necessary

for purely navigation purposes, it should assert and exercise these rights, so belonging to it or so acquired, as paramount to the rights of ownership or of use belonging to the riparian. But the reasonable necessity for navigation purposes marks the limit of the rights which the government has or can acquire against the will of the riparian, or as purely paramount rights.

We have here a surplus water power, developed incidentally to the navigation improvement, the government owning and controlling to the limit of navigation interest, the riparian owning the remaining rights. This is an obverse case to the development by the riparian of the water-power dam, under consent of the government acting in the interests of navigation; for in the latter case the navigation facilities are incidental to the water-power improvement. In both instances the question of the rights and obligations between the government and the riparian can be properly solved only by observing the distinctions arising from the sources of their respective rights. If it were physically feasible, as it might be in some cases, that the surplus water power could be utilized without the aid of the navigation dam, the riparian would have the right to enjoy the full beneficial use of such power, subject to the condition that he did not affect the flow at the navigation dam in such a way as to interfere with its operation for navigation. This might be done, for example, by constructing around the pool created by the navigation dam, or, if the contour of the river permitted, by constructing across the owner's land from a point above the pool to a point below the dam; but the expense of such development in most instances would be prohibitive. The possibility, however, illustrates the nature of the riparian right. On the other hand, to allow the riparian the free use of the development of his surplus water power afforded by the navigation dam itself, would give to him a financial advantage from the navigation development. If, therefore, he were to use his surplus water power under the navigation development, instead of by a more expensive independent water-power development, it would be proper, regardless of his technical legal rights, that he should pay to the government for such advantage an annual charge based upon the fair cost of construction and maintenance, not of the navigation dam and facilities as constructed by the government, but of such water-power dam as would have been reasonably necessary if the navigation improve-

ment had not been made. These should be matters of contract adjustment between the government and the riparian. What we are here interested in is the fact, that, without acquirement by the government with compensation, the surplus water power at navigation dams belongs to the riparian; meaning by surplus water power, all water power and all use of the water, not reasonably necessary to the operation of the dam as a navigation facility.

This distinction between the proprietary interest of the government and its right of control as sovereign under its constitutional power to regulate navigation, is an important one; for the refusal, by avowed advocates of conservation, to recognize this distinction, has occasioned disputes which have become the most serious obstruction to the utilization, and, therefore, to the conservation, of water-powers appurtenant to private riparian lands. This leads to a discussion of the legislative policy of conservation as applied to private riparian water-powers upon navigable streams.

PRIVATE RIPARIAN WATER-POWERS.

Subject to the paramount control of the federal government to protect navigation, as already defined, the control of water-powers upon all streams, navigable or unnavigable, belongs to the states within which the water-powers are located. This applies to all the original states and to states since admitted to the union; and, as between the state and individuals, the proprietary interest and its character and extent are determined by the law of property rights as established in the respective states.¹⁴ In accordance with these principles, so definitely fixed, the Congress has expressly recognized, by federal statutes, the controlling efficacy of local property laws and customs, with regard to water rights, existing in those states where the common law has been either repudiated or modified, and has, in statutory terms, confirmed the rule established by the decisions just cited from the federal Supreme Court.¹⁵ Nevertheless, inconsistently, in the face of these admitted rules of state control

¹⁴ *St. Anthony Falls Water-Power Co. v. Water Commissioners*, 168 U. S. 349, and cases cited in opinion.

¹⁵ Act of July 26, 1866, 14 U. S. Stat. at Large, 253, and other federal statutes above cited; also Act of March 3, 1891 (Repeal of Timber Culture Laws), 26 U. S. Stat. at Large 1093.

for water-power purposes, the United States Forest Service, assuming to act under its authority for establishing rules, has indirectly encroached upon the power of the states to control water-courses, by establishing restrictive rules and regulations for such parts of the public domain as are essential for dam and reservoir sites, canals, transmission lines, and for similar uses, thus extending, indirectly, the policy, or lack of policy, of revocable permits and insecure tenure of investors, to the development of water-powers upon many navigable and unnavigable streams and watercourses, the control of which, for water-power purposes, belongs to the states.¹⁶

Accordingly, in order to determine the law of property rights of the individual as against the state, or of either or both as against the federal government, and, therefore, to determine the rule by which the federal government itself and its courts are bound, we have to resort to the law as established by the respective states. So it is that in Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming the so-called "Colorado doctrine" governs, whereby the common law of riparian ownership and control of water-powers is repudiated and the law of control by the state prevails, state statutes allowing and regulating appropriation of waters for power and other private uses with preference in the order of actual appropriation.¹⁷ In others of the far western states there prevails the "California doctrine," by which the common law of riparian rights governs, modified only by appropriation rights vested before the riparian lands passed to private ownership. This is the rule in California, Kansas, Montana, North Dakota, Oklahoma, South Dakota, and other states.¹⁸

In the states lying east of or bordering upon the Mississippi River, the common-law rule of riparian rights generally prevails. In these states, to the extent that the common law of riparian rights has been retained, the right to the beneficial use of the water-power appurtenant to riparian land is a part and parcel of the land and belongs to the riparian owner. The state has no right of ownership or control in a proprietary sense. Its rights are confined to that of

¹⁶ See Forest Service "Use Book" issued December 28, 1910.

¹⁷ *Land & Canal Co. v. Ditch Co.*, 18 Colo. 1, 30 Pac. 1032 (1892); *Kansas v. Colorado*, 206 U. S. 46 (1907); *Boquillas Co. v. Curtis*, 213 U. S. 339 (1909); *United States v. Rio Grande Co.*, 174 U. S. 690, 706 (1899).

¹⁸ *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674 (1886); *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570 (1896); *Sturr v. Beck*, 6 Dak. 71, 133 U. S. 541 (1890).

a sovereign power of control for the public use of navigation. All proprietary interests belong to the riparian, and extend to all beneficial uses of the water-power including the revenues therefrom.¹⁹ The distinction as to navigable streams, that in some states the riparian title extends only to high-water mark with the limited sovereign title in the bed and waters, and that in other states the riparian title extends to the middle of the stream, subject to the sovereign control for navigation, is, for practical purposes, merely speculative.²⁰ The rule is the same whether the stream be intrastate, interstate, or an international boundary.²¹

These rights, reserved to and established in the states, and these property rights of beneficial use, fixed by the law of the states in the riparian, are subject only to the paramount control of the federal government for the definite and specific purpose of protecting navigation. The authority of the Congress is limited to the prevention of any unreasonable interference with navigation.²² Although the interests of navigation are paramount, the sovereign right of the government, national or state, to control or protect for this or other public use, while a conflicting interest, is not inconsistent with the exercise of the private right. Each must have regard for the other, but the private right persists up to the point where its exercise becomes an unreasonable interference with the public right. Both rights are limited, but the exercise of the limited public right cannot be used as a means of extinguishing or appropriating the private right.²³

GOVERNMENT CONTROL OF PRIVATE WATER-POWER DAMS.

With the object of protecting highway streams from unreasonable interference with navigation by private structures, including water-

¹⁹ *St. Anthony Falls Water-Power Co. v. Water Commissioners*, 168 U. S. 358, citing the property law of Minnesota which is substantially that of all riparian-right states.

²⁰ *Union Depot Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626 (1883); *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139 (1893); *Hobart v. Hall*, 174 Fed. 433, aff'd 186 Fed. 426 (1911).

²¹ *United States v. Chandler-Dunbar Co.*, 209 U. S. 447 (1908); *Niagara County v. College Heights Co.*, 111 N. Y. App. Div. 770, 98 N. Y. Supp. 4 (1906); *People v. Smith*, 70 N. Y. App. Div. 543, 75 N. Y. Supp. 1100 (1902); aff'd 175 N. Y. 469, 67 N. E. 1088 (1903).

²² *Union Bridge Co. v. United States*, 204 U. S. 364, 399 (1907).

²³ *State ex rel. Wausau Street Ry. Co. v. Bancroft*, 148 Wis. 124, 134 N. W. 330 (1912); *Crookston Co. v. Sprague*, 91 Minn. 461, 98 N. W. 347 (1904). On this and other points see "Limitations of Federal Control of Water-Powers" by Rome G. Brown, Senate Document No. 721, 62d Congress, 2d Session.

power dams, the Congress has provided that such structures are prohibited except with the consent of the Congress and that the plans shall be subject to the approval of the Secretary of War and of the Chief of Engineers.²⁴ The influence of one view of the policy of conservation is shown by later legislation compelling, at the expense of private owners, the construction and maintenance in water-power dams of navigation locks and the furnishing of power to operate the same, and imposing charges out of revenues from the water-power, to be used to promote navigation in other parts of the stream; also limiting the period of federal consent to fifty years, without any provisions for renewal or for compensation, at the expiration of that period, for the cost or value of structures.²⁵ As late as 1910 the National Waterways Commission, referring to the attempt of the federal government to collect tolls from the revenues of the private water-power owner, stated that it was without authority, and that such tolls, if imposed, could not be collected, because the federal government has no proprietary interest and no right arbitrarily to grant or withhold consent, and that such tolls could not be levied on the theory of a tax, because they discriminated against future developments in favor of those already made.²⁶ This was after a most thorough examination of the practical and legal questions involved, both in Congress and at special hearings before the commission. Yet, in March, 1912, the same commission, in its final report, urges complete federal control, under the commerce clause, of all hydro-electric plants upon all streams and in all states, and that, until such control be exercised, charges be made in favor of the government out of the revenues of the private water-powers in order to create a fund for the general purposes of navigation improvement.²⁷ An attempt is now being made in the Congress to insert in the so-called Connecticut River Bill a provision for such revenue charges, and the chief supporter of this proposition is the Chairman of the National Waterways

²⁴ Act of September 19, 1890, 20 U. S. Stat. at Large, 426; Act of July 13, 1892, 27 U. S. Stat. at Large, 88; Act of March 3, 1899, 30 U. S. Stat. at Large, 1121.

²⁵ Act of June 21, 1906, 34 U. S. Stat. at Large, 386; Act of June 23, 1910, 36 U. S. Stat. at Large, 593.

²⁶ Report National Waterways Commission, Senate Document No. 469, 62d Congress, 2d Session, p. 86.

²⁷ Report National Waterways Commission, Senate Document No. 469, 62d Congress, 2d Session, p. 61.

Commission.²⁸ The same policy was also supported by Secretary of War Stimson, Secretary of the Interior Fisher, and by President Taft.²⁹

The dispute over this question, which has been carried on in the Congress for several years, and which is now at its height, has been, and threatens to continue, a serious obstacle to private water-power development. It is a dispute between ultra-conservationists, upon the one side, and the more conservative element, upon the other. The source of the difficulty is obviously the growing tendency to depart from the practical and fundamental principle of conservation of water-powers, which is to promote their immediate and general utilization, and to view private water-powers primarily as a possible source of direct revenue for public use.

It is in this respect that the drastic innovations of the Dam Acts of 1906 and 1910 have discouraged water-power development. They put upon the owner the burden of a large initial expense in favor of the government, and limit the right, acquired under consent of the Congress, to a period of fifty years, without any provision for adjustment between the owner and the government at the end of that period. And the power is reserved to revoke the permit at any time, upon paying to the owner the then reasonable value of the physical plant.³⁰ Such provisions are naturally obstacles to improvement; and the National Waterways Commission, in its final report, says, with reference to them, that

"experience has shown that these provisions are not well suited to encourage development of water power or to protect the public interest. Nothing is more discouraging to the investor of capital than uncertainty. . . . The necessity of amortizing the plant, in addition to all other costs of rendering the services, will inevitably result in an increased charge to the consumer, which amounts to a tax of doubtful equity on the local

²⁸ See majority and minority reports United States Senate Commerce Committee, No. 1131, 62d Congress, 3d Session. See "Who Owns the Water-Powers" by Rome G. Brown, Case and Comment, March, 1913.

²⁹ See Report Commerce Committee on the Coosa River Bill, S. 7243, 62d Congress, 2d Session; veto message of the President on the same bill; but compare opinion of Secretary of War Taft in Des Plaines River matter, February 23, 1907; Report House Committee on Interstate and Foreign Commerce, February 25, 1909, 60th Congress, 2d Session.

³⁰ Act of June 21, 1906, 34 U. S. Stat. at Large, 386; Act of June 23, 1910, 36 U. S. Stat. at Large, 593.

community for the benefit of the general government. This unnecessary burden could be avoided if Congress would enact legislation providing for a more equitable form of franchise."³¹

It is apparent that consent should be without limit of time, for the interests of navigation and of the public, so far as any public right of control over the water-power exists, are preserved by the other general provisions of these acts.

Under the discussion of government navigation dams above, the limitations between private and federal control of the water-powers in navigable streams have been suggested. In these questions there are three classes of disputants, representing two extremes and a conservative mean. One extreme claim is that, both at navigation dams and at private water-power dams, the federal government has a right to assert and should assert not only control but even ownership, of all the water-power developed; that in the case of navigation dams no rights of the riparian should be recognized; and that in the case of water-power dams built by the riparian only such rights of beneficial use should be allowed to the riparian as will fairly compensate him for the expense which he has incurred in the improvement, — a concession by the government in consideration that the government without expense has obtained, as incidental to the water-power development, certain navigation facilities. The other extreme is the claim that the riparian owns everything and that the government should receive no facilities or advantage from the use of the bed, or of the real estate or of water-power rights, whether for navigation purposes or otherwise, except upon full compensation to the riparian.

Neither of these views is logical or consistent with the proper view of the constitutional rights and obligations of the parties concerned. It is practically impossible to fix in all cases an adjustment precisely in accordance with the strict legal rights. A proper governmental policy can never be adopted, however, without rejecting both these extreme views by a recognition of the general principles governing the constitutional powers of the government upon the one hand and the property rights of the riparian upon the other.

³¹ Report National Waterways Commission, Senate Document 469, 62d Congress, 2d Session, p. 54.

It is hopeless to discuss these questions with those legislators who refuse to recognize any distinction between the constitutional *right* of the Congress, as fixed by a proper regard for the limitations of constitutional authority, and the *power* of the Congress to do this or that thing, measuring such power only by the possible inability of those against whom it is exerted to protect themselves. There is a vast difference between mere physical or brute power and a right based upon authority. It is true that under its authority to protect navigation the Congress may prohibit, as it does, the construction of private water-power dams in navigable streams, except with congressional consent. But its right to reserve and exercise such power of consent extends no further than the general right to which it is an incident, that is, the right to protect navigation. To the extent necessary to protect navigation, and to that extent only, is the right and power of consent exercised with authority. It is useless to argue with a legislator who says that, having the right of prohibition except upon consent, the Congress has, therefore, not only the power, but the constitutional right, arbitrarily to give or to withhold the consent, and that having such arbitrary power, it has not only the power but also the right to attach any condition, of whatever nature or for whatever purpose it may choose, to the granting of the consent.

I am here discussing the question of a wise constitutional policy, assuming the exercise by the Congress only of rights and powers authorized by the Constitution, and assuming that every member of the Congress has regard for his oath to support that Constitution. It is not an answer, therefore, to any of the propositions which are here suggested, to ask whether and how, under the Constitution, a private riparian owner could prevent drastic, arbitrary and unconstitutional legislation, either by mandamus against the Congress or against any of the executive departments whose action should exceed the rights expressly limited by the Constitution. It is upon this asserted unlimited power of the Congress, arbitrarily to withhold consent to the building of water-power dams upon navigable streams, as distinguished from its really authorized, constitutional and limited right, that has been based the attempt to impose drastic and confiscatory burdens upon the riparian in connection with legislation providing for private water-power dams. Among such attempted unconstitutional burdens are those of tolls or

charges from the proceeds of the water-power for revenue purposes.

Charges for revenue, to be paid out of the proceeds of the water-power, either as already provided in federal statutes or as proposed to be extended, should be avoided, not only on the ground of lack of constitutional authority to impose and enforce such charges, but also because the exaction of such tribute is against a wise policy. Under the principles excluding any proprietary right in the federal government, already shown, and fixing the proprietary interest in the riparian owner, it follows that the levy of tolls by the federal government is unjustified; for after the private riparian owner has been burdened with the expense of locks and of their operation, and has conformed his works, at his own expense, to present and future navigation purposes, and is obligated to operate them subject to the uses for navigation, then all the remaining beneficial uses belong to him. If the property law peculiar to any particular state limits the common-law riparian right so as to give to the public any right of advantage further than it would have under the strictly common-law rule, then such advantage, so far as the water-power itself is concerned, belongs to, and is subject to the control only of, the state government. The exaction of tolls or charges, therefore, beyond the limits indicated, is an encroachment upon the rights of the states or of the individual riparian, or of both. The legal limitation of the power to levy charges is that governing the imposition of a license fee usually arising from the power of regulation, which, in this case, is a power, not of exaction of revenue or of prohibition, but one purely of regulation for a specified purpose. Such fee may be based upon the actual expense occasioned to the government in supervising and in carrying out the requirements for the issuance of the license.³²

But, besides being without authority, the exaction of such tolls operates as a discouragement to development. This results, not merely from the fact itself of toll charges, but also from the manner

³² It may include not only the expense of issuing the license, "but also the additional labor of officers and other expenses imposed by the business for which the license is issued, but nothing beyond this. . . . The amount of the license fee or charge is to be considered in determining whether the exaction is not really one of revenue or prohibition instead of regulation." *City of Ottumwa v. Zekind*, 95 Ia. 622 (1895); *Savage v. Jones*, 225 U. S. 501 (1912). See also *State ex rel. Wausau Ry. Co. v. Bancroft*, *supra*, declaring as confiscatory tolls by the state under the guise of regulation.

in which they are imposed. The fact of their imposition and their amount are left uncertain and changeable at any time at the will of him who happens to be the head of the War Department. The manufacture and distribution of energy from water-power are mostly intrastate, and the matter of regulation of rates is, therefore, primarily a matter of state regulation. For this purpose most states have commissions, affording means of proper adjudication, consistent with local conditions. Moreover, any charge for revenue to the federal government means increased expense of operation which must be taken into consideration by any tribunal fixing rates to the consumer. Federal tolls, even though used for the general improvement of navigation, impose an unequal burden upon comparatively isolated localities for a general public benefit; and at the same time that they thus diminish the advantage to the locality in which the water-power is situated, they encroach upon the right of control by the local state authorities.

This dispute, which is now waging in the Congress, is important here because the inconsistent and uncertain provisions heretofore made and the failure to adopt a definite, business-like policy have been and are antagonistic to the cause of conservation, which, in the case of water-powers, as we have seen, is to promote rapid and wide utilization. Projected developments have been abandoned or postponed, because investors halt before the burdens, the uncertainties and unnecessary hazards placed upon such investments. Besides their adaptability to the manufacture of electrical energy for general distribution, water-powers are peculiarly fitted for the manufacture of certain products. In some instances large industries have been turned from this country to others, for the very reason that the attitude of the government toward private water-power development made investments here insecure.³³ There has been for a long time at Washington a sort of deadlock between those representing the two sides of this question. The majority in the Congress oppose the levy of tolls by the federal government as repugnant to constitutional law and as against a wise policy;

³³ "Water Power in the United States" by M. O. Leighton, Chief Hydrographer of the Geological Survey, in *Annals of the American Academy of Political and Social Science*, May, 1909; Report by Senator Bankhead, from Committee on Commerce accompanying S. 7343, the bill for dam across Coosa River, 62d Congress, 2d Session.

while the executive departments of government generally have been in favor of such tolls.³⁴ The result has been the retardation of water-power development upon navigable streams.

The usual arguments against "big business" and against monopolies have been urged in favor, not only of general federal control, but also of the exaction of tolls. The pseudo-conservationist assumes that water-power is a comparatively inexpensive source of energy and that, therefore, investors in water-power developments can compete with steam power, although subject to the levying of large and uncertain tributes, not only out of their original investment, but also out of their income. As a matter of fact, the development of a hydro-electric plant requires a capital investment per horse-power produced so great that, as against the original investment in a steam plant together with the cost of fuel, it is only in exceptional cases that even without extraordinary burdens the water-power plant is the more economical. Moreover, the hazards of the investment are greater in the case of water-powers, and the most economical development of water-power requires an auxiliary steam plant to supplement the water-power at lower stages of flow. Water-power development requires big capital and means big business. As to its regulation and control, including the matter of rates, it is subject to the same laws and tribunals as other similar public-service enterprises. The exaction of tolls has no anti-monopoly effect, except as it prevents investments altogether. On the other hand, it creates an extra tax or charge upon the consumer, to the extent that it increases the cost of operation.

³⁴ See report of sub-committee on dams and water-powers to Committee on Interstate and Foreign Commerce, House of Representatives, 60th Congress, 2d Session, February 25, 1909, showing President's veto of Rainy River Dam Bill, House Committee Report on same, President's veto of James River Dam Bill, and other documents; Report Senate Committee on Commerce on James River Dam Bill, being Report No. 585, 60th Congress, 1st Session; Report of Senate Committee on Commerce on Senate Bill 7343, the Coosa River Dam Bill, 62d Congress, 2d Session; President's veto message of Coosa River Dam Bill, Senate Document 949, 62d Congress, 2d Session; Majority and minority reports of Senate Commerce Committee, 62d Congress, 3d Session, on Senate Bill 8033, the Connecticut River Bill; also debates in the United States Senate, Congressional Record, February, 1913, on Connecticut River Bill. The President, Secretary of War, and Secretary of the Interior favored the inclusion of toll charges in the Connecticut River Bill; but they were eliminated from the bill by vote of 53 to 29, and the bill passed the Senate as so amended by a vote of 74 to 12. See Congressional Record of February 17, 1913.

The appropriation by the government of a portion of the proceeds belonging to the riparian out of the beneficial use of his water-power has, indeed, a tendency to create and to promote water-power monopoly. Since the dispute in the Congress over these questions was precipitated about six years ago, water-power development upon navigable streams in this country, except those constructed under prior acts of the Congress, has been comparatively at a standstill. Water-power development has since been confined mostly to the small streams where congressional consent was not required. Millions of capital have been ready and are still ready and anxious for investment, if fair and safe provisions may be obtained. In the meantime enterprises under previous legislation, forever free from special burdens, are monopolizing the water-power markets, in which the supply is thus artificially limited. Thus by discouraging development of water-power commercially feasible, as well as by exacting charges which new enterprises might prefer to bear rather than to be deprived of the necessary legislative consent, a monopolistic advantage is given to those who have already developed, as against those who propose, future developments. In the meantime the large undeveloped water-powers of the country are going to waste and conservation, in its own name, is defeating itself.

FEDERAL OBSTACLES TO CONSERVATION.

From the foregoing it is apparent that the affirmative policy of the Congress, so far as formulated, in respect to water-powers, is already too much one of reservation, or of hindrance to development. It is antagonistic to the utilization of this inexhaustible source of energy, and, therefore, an obstacle to conservation. The failure on the part of the Congress to establish a definite, consistent, and business-like policy is an additional obstacle. The difficulties are further increased by the attitude of those who insist, under the guise of conserving natural resources, upon using the water-powers as a means of revenue to the federal government, instead of regarding them as an economical and practical means of promoting the industrial developments of the localities in which they are situated. Indeed, in some instances where the question of federal revenue is not involved, there seems to be a disposition to assert the right of control merely for the sake of emphasizing

the power of the federal government as against the rights of the respective states and of their citizens.

In one instance even treaty provisions are disregarded. The United States and Great Britain, in 1910, ratified a treaty between the two nations by which the diversions for power at Niagara Falls were expressly limited to specific quantities for each side of the international boundary.³⁵ The amounts of diversion allowed were fixed from the computations of the United States engineers and other experts as being neither a hindrance to navigation nor to the scenic beauty of the Falls. Pending the negotiations for the treaty, and as a tentative arrangement, a statute was passed limiting the amounts of diversion upon this side of the river to amounts less than those afterwards fixed by the treaty and restricting importation to this side of power from the Canadian side.³⁶ Since the ratification of the treaty, several bills have been presented to carry out its object and terms, but for successive sessions such bills have been opposed by those assuming to act in the interests of conservation, so that the restrictions and limitations existing before the treaty have been continued in force.

The treaty expressly limited the diversion upon the American side to less than thirty-six per cent of the total amount of diversion allowed upon both sides, the total amount being fixed below the amount which would affect either navigation or scenic beauty or any public interest. That the diversions could not affect navigation in the slightest degree is apparent and is conceded by all engineers. The only basis for federal interference is therefore lacking. However, under an imaginary constitutional power in the Congress to protect scenic beauty, the Burton Act of 1906 was passed pending the treaty negotiations. A dozen years before, in accordance with their property rights, arising from riparian holdings and legislative grants from the state of New York, two companies had invested millions of dollars in the construction of plants, upon the American side, requiring for their operation at full capacity diversions from the falls of amounts of water not exceeding the amounts afterwards fixed by the treaty for the American side. The conser-

³⁵ Treaty between United States and Great Britain as to boundary waters between United States and Canada, proclaimed May 13, 1910, Treaty Series 548.

³⁶ Act of June 29, 1906, and joint resolution of March 3, 1909, being House Joint Resolution No. 262.

vation of scenic beauty was thus assured by the treaty provisions and at the same time interference with navigation was prevented, for the treaty amounts were based upon careful scientific investigation. It is manifest that, especially after the treaty, the Congress had no constitutional right to limit directly or indirectly diversions upon either side, — at least, not to any amounts below those fixed by the treaty. Diversions beyond the treaty limits were, by the treaty, discouraged and, in fact, prevented. The treaty contemplated unrestricted rights of importation.

None of the American investors have ever asked Congress for permission to divert a single cubic foot of water beyond the limits expressly fixed by the treaty; but have confined their requests to have the statutory authority for permits extended to the limits fixed by the treaty. At the same time, Canadian investors have asked for permission to import to this side the electrical energy manufactured from the water-power that they develop within the limits fixed by the treaty. Nevertheless, these requests, which are consistent with and promotive of the true policy of conservation, whether it be viewed as a conservation of power or of scenic beauty, have been vigorously opposed by certain self-styled "defenders" of Niagara, who misrepresent to the public the nature of the requests made by the American investors at Niagara and distort those reasonable requests into demands for unlimited permits for diversion. Those investors are heralded as assailants of the beautiful Niagara. Their modest prayer for an observation of the limited treaty provisions is heralded as a wholesale "attack" which threatens the very "life of the falls" and as an attempt to "cut the throat of beauty for gold."³⁷ It has been demonstrated that whatever unwatering of the crest of the falls has occurred in past years has been due entirely to the natural gradual recession of the apex of the Horseshoe falls, and is not due at all to any water-power diversions. In fact, the extra amount of diversion which is asked, and which is allowed by the treaty, upon the American side, over the amounts now allowed by continuing in force the original statute enacted as a *modus vivendi* pending the negotiations of the

³⁷ See "The Defender of Niagara" in *Cosmopolitan Magazine*, April, 1913. For similar, prejudiced and grossly erroneous views of the Niagara question see also "An Expensive Experiment" by R. P. Bolton, *The Baker & Taylor Co.*, New York, 1913; and the "Outlook," March 29, 1913.

treaty, is only 4400 cubic feet a second, or less than eight per cent of the total amount fixed by the treaty and less than two per cent of the total ordinary flow over the falls, which amount has been demonstrated to be utterly inappreciable so far as it could possibly affect either scenic beauty or any public interest.³⁸

The result has been the prevention of further development of industries on this side of the river, where there is a demand for immediate use of all the electrical energy that could be produced on the American side and of all that could be imported from the Canadian side; at the same time there is a forced and steadily increasing industrial development upon the Canadian side, where the use of the falls for power is limited only by the terms of the treaty. As fast as the electrical energy manufactured from the water-power allowed to the Canadian side is taken up there, the amount which can ever be imported to this country is permanently decreased. The extra amount allowed by the treaty for use upon this side over the limit retained by federal legislation, is still unutilized. Thus, in the name of conservation, industrial growth and all other advantages of water-power development and use are promoted by the United States Congress upon the Canadian side at the same time that they are retarded upon the American side. A more unreasonable and suicidal thwarting of the true policy of conservation could not be devised.

CONSERVATION UNDER STATE LEGISLATION.

Some well-meaning friends of conservation seem to be obsessed with the idea that ownership and control by the government, federal or state, of water-powers must be extended to the utmost limits, and that constitutional prohibitions may be justifiably disregarded or evaded in so far as they stand in the way of carrying

³⁸ See Report of Hearings before House Committee on Foreign Affairs, January 16, 1912, and following days, on House bills, "to give effect to the fifth article of treaty between the United States and Great Britain, signed January 11, 1909"; also report of hearings before House Committee on Rivers and Harbors, January, 1911, on the same subject; also Report of Hearings before House Committee on Rivers and Harbors, April, 1906, on the Burton Act; also report on "Water-Powers of Canada," published by Commission of Conservation of Canada, September, 1911; also see Reports No. 1488, House Committee on Foreign Affairs, February 8 and February 25, 1913, 62d Congress, 3d Session, majority and minority reports on H. R. 28674.

out this idea. It is the blind adherence to this unlawful and unwise policy which has the greatest effect in maintaining a barrier to what is really the conservation of water-powers, because it discourages and obstructs proper and constitutional legislation for the promotion of water-power development. That this is true with respect to federal legislation has been shown. But the same fallacy prevails among many conservationists with respect to state legislation. The theory is too prevalent that, because the federal Supreme Court has fixed the state law as the law of property rights with regard to water-powers, therefore the power and authority of the state over water-powers are unlimited. This idea disregards the fundamental proposition of constitutional law that, where vested property rights are established by the common law of a state, then such rights cannot be diminished or destroyed except by due process of law; and that, therefore, they cannot be taken away by any fiat of the voters whether in the form of a state statute or in the form of an amendment to the state constitution. The law of the state by which property rights are determined is the state common law as adjudicated by the decisions of the highest court of the state.³⁹ The rule of property right so fixed is binding upon all courts, including the federal courts, so far as concerns property rights within the state in question. The fact that in some states a more extended rule of ownership and control by the state has been established than in other states as the law of property rights, or that the rule is radically different in different states, does not justify the conclusion that any state may arbitrarily change the rule of property rights from that which has once been established. The fact that one rule in one state has been established with a better regard for public policy, than the rule established in another state, or that one is more promotive of general conservation than another, does not permit an arbitrary change of property law in a state where the rule may be less favorable to general public advantage. As to each state we have to take the rule of property rights as we there find it, and, having regard for that rule, work out, as far as possible, consistently with the law, the objects of conservation.

³⁹ *St. Anthony Falls Water-Power Co. v. Water Commissioners*, 168 U. S. 349, 365, 371, and cases cited in the opinion; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 159 (1896); *Kansas v. Colorado*, 206 U. S. 46, 94 (1907); *United States v. Rio Grande Co.*, 174 U. S. 690, 702 (1899).

The too prevalent disregard of these distinctions, and persistent attempts, regardless of constitutional limitations, to thrust aside these obstacles presented by the law, have tended to discredit and to retard the cause of conservation.

Attempt at conservation by constitutional fiat is illustrated by the adoption, in 1889, in the state of North Dakota, of a constitutional amendment providing that "all flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation, and manufacturing purposes."⁴⁰ The decisions of the state supreme court had, as against subsequent appropriation, already established the law of riparian rights as the property law of that state.⁴¹ In a later case this constitutional provision was invoked as abolishing that law of riparian rights; but the state supreme court held that this section of the constitution would itself be unconstitutional if it appeared that the property rights, as fixed by the previous decisions of the state court, were thereby to be invaded.⁴² Similar attempts, all of them unsuccessful, have been made to change a state common law of riparian rights to one of state control and ownership of water-powers. Such was the attempt made in the Minnesota legislature of 1911 when the Wisconsin water-power statute of that year was urged for passage. Although it passed the house it was stopped in the senate upon the opinion of the attorney-general that it was confiscatory and unconstitutional.

The same year, however, a statute was passed in Wisconsin attempting to change the law of riparian rights established in that state to the law of state ownership and control of water-powers.⁴³ This legislation proceeded on the theory, declared in its preamble, that all the beneficial use and natural energy of the water of navigable streams in that state belong to the state in trust for all the people and are subject to the control of the state for the public good. Beside other drastic provisions, it attempted to levy upon the private owner in behalf of the state tolls at varying rates per horse-power. The supreme court of the state unanimously declared the statute in conflict with the established property law, and

⁴⁰ N. D. Const., Art. XVII, sec. 210.

⁴¹ *Sturr v. Beck*, 6 Dak. 71, 133 U. S. 541 (1890).

⁴² *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570 (1896).

⁴³ Wis. Laws, 1911, c. 652.

confiscatory and unconstitutional.⁴⁴ The further significance of this statute as an alleged conservation measure is shown by the fact that the passage of such a statute was made the chief feature of the political campaign throughout the state prior to the election of the legislature and that it was urged to the voters of the state and afterwards to the legislature as a progressive conservation measure. However, from the time the agitation started until the decision of the supreme court, invalidating the statute, was filed, water-power development in the state of Wisconsin was stopped. Indeed, despite the action of the state supreme court, propositions for water-power development in that state are still regarded by investors as unsafe. They prefer investments in localities where there has been a different demonstration as to the prevailing idea of what constitutes conservation.

Conservation of water-powers, whether through national or state legislation, will never be realized, so long as the fallacy persists that the interests of conservation and the interests of water-power owners are at war with each other. This fallacy has been the cause of most of the erroneous and futile attempts by legislatures to solve; with respect of water-powers, the problem of their conservation. This fallacy itself has sprung from a failure on the part of both classes of interests to appreciate the underlying principles involved. Advocacy of hasty and extreme measures, inimical to the property rights of private owners and rendering hazardous the necessary investments of capital, has tended to create a hostile attitude on the part of private interests toward the carrying out of a conservation policy. This hostility, in its turn, incites a further spirit of antagonism on the part of the forces of conservation. The questions of conservation become confounded with questions concerning monopoly, competition, and the relations between the producer and the consumer. But those representing the two classes of interests involved, those representing the public and those representing investors, are now realizing, more than ever before, the fact that real advantage to any locality or to the public at large lies upon the same lines as real advantage to the holders of investments in water-power development. Both should recognize the feasibility

⁴⁴ State *ex rel.* Wausau St. Ry. Co. v. Bancroft, 148 Wis. 124, 134 N. W. 330 (1912).

of getting together on some basis which will, at the same time that it admits of adequate protection to the public, also provide an attractive field for investment. Public-utility companies should become convinced that a proper and fair restriction and regulation in the operation of their properties are reasonable and necessary, and eventually promotive of their own best interests. They should be convinced, as they are more and more, that reasonable concessions, even if beyond the limit of their exact legal obligations, assure to them a readiness on the part of legislative bodies to yield also something in return, including a more certain tenure and safer and more comprehensive protection, through legislation, of the beneficial use belonging to them as proprietors.⁴⁵

Both the public and the private interests involved require water-power utilization and further opportunities and facilities for utilization. The fact should be recognized in legislatures, national and state, that the questions of the control of rates, of proper regulation and of prevention of monopoly, can be adequately solved without being confused with legislation enacted for the purpose of encouraging and promoting water-power development. It should be recognized that resort need not be had to specious pretexts to strain or evade the law governing the rights of states or of individuals, and that the refraining from undue and illegal advantage and privilege, by either the government or the individual, is not inconsistent with a proper conservation policy.

Adequate water-power development and its economical operation mean, to some extent at least, combination and consolidation. They involve large capital investments. But they do not, for that reason, mean, as is too often assumed, either a menace to the general public interest or a menace to the consumer himself. It is through private ownership and control of water-powers that the objects of conservation can best be accomplished. Investment of private capital in their development should be encouraged. The policy of a paternalistic or socialistic control by the government, in order to extract directly from the proceeds of water-power developments revenues or charges for the benefit of the people as a whole, is antagonistic to the purposes of conservation. Such a policy is

⁴⁵ See "The Right Use of the Nation's Water Power" by M. O. Leighton, Chief Hydrographer of the United States Geological Survey, *Leslie's Weekly*, February 20, 1913.

founded upon an unreasonable misapprehension of the significance of private ownership and of large investments. Mr. Justice Holmes recently said:⁴⁶

"We are apt to think of ownership as a terminus, not as a gateway — and not to realize that, except the tax levied for personal consumption, large ownership means investment, and investment means the direction of labor toward the production of the greatest returns, returns that so far as they are great show by that very fact that they are consumed by the many, not alone by the few. If I might ride a hobby for an instant, I should say we need to think things instead of words — to drop ownership, money, etc., and to think of the stream of products; of wheat and cloth and railway travel. When we do, it is obvious that the many consume them; that they now as truly have substantially all there is, as if the title were in the United States; that the great body of property is socially administered now, and that the function of private ownership is to divine in advance the equilibrium of social desires—which socialism equally would have to divine, but which, under the illusion of self-seeking, is more poignantly and shrewdly foreseen."

The policy of conservation, as applied to water-powers, should be recognized as the policy of promoting, as rapidly and as extensively as possible, within the law, the utilization of the perpetual and inexhaustible resources afforded by every water-power in this country, the development of which is, or can be made, economically feasible.

Rome G. Brown.

MINNEAPOLIS, MINNESOTA.

⁴⁶ Speech of Mr. Justice Holmes at Dinner of the Harvard Law Association of New York, February 15, 1913, Senate Document No. 1106, 62d Congress, 3d Session.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President.*
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer.*
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,
FRANCIS S. WYNER.

THE CONSTITUTIONALITY OF THE PIPE-LINE AMENDMENT. — By an amendment to the Interstate Commerce Act adopted in 1906 all persons engaged in the transportation of oil by interstate pipe-lines are placed on the footing of common carriers.¹ A recent decision of the Commerce Court holding this amendment invalid because it applies to pipe-lines which have never professed to carry for the public,² presents a constitutional question of considerable importance. *Prairie Oil and Gas Co. v. United States*, U. S. Commerce Ct., March 11, 1913.

It may fairly be implied from the cases that one who transports his own property across a state line for business purposes is engaged in interstate commerce.³ The first important question, then, which this decision raises is whether a statute which does not regulate the business of private carriage, but obliges all pipe-line carriers of oil to carry for the public, may fairly be regarded as a regulation of commerce. The statute in effect prohibits the business of private pipe-line carrier of oil. To what extent the power to regulate interstate commerce is the power to prohibit that commerce is not yet settled. It is doubtful how far the transportation of a useful article can be prohibited.⁴ It is well

¹ 34 U. S. STAT. AT LARGE, 584, c. 3591, § 1.

² Pipe-lines which actually transport oil for the public are generally treated as common carriers. *West Virginia Transportation Co. v. Volcanic Oil and Coal Co.*, 5 W. Va. 382. See *Giffin v. Pipe Lines*, 172 Pa. St. 580, 586, 33 Atl. 578, 580. See also *WYMAN, PUBLIC SERVICE CORPORATIONS*, § 59.

³ *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 29 Sup. Ct. 527; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 Sup. Ct. 564.

⁴ See *Lottery Case*, 188 U. S. 321, 362, 23 Sup. Ct. 321, 329; *United States v. Dela-*

settled, however, that the total exclusion from commerce of undesirable persons or commodities in the interest of public health or morals is a regulation of commerce.⁵ Since the purpose of the present act is directly to benefit commerce, it would seem even more clearly within the regulating power. Moreover, it does not exclude any commodity from commerce, but merely forbids transportation by private pipe-line. It is thus scarcely more than the prohibition of a method of doing business considered detrimental to commerce, which is certainly within the scope of the commerce clause.⁶

The statute therefore appears to be constitutional unless it is a violation of the Fifth Amendment. That amendment apparently limits the power of Congress to interfere with the liberty and property of the individual by commercial regulations in the same manner in which the power of the states is restrained by the Fourteenth Amendment.⁷ Congress therefore cannot deprive the owner of a pipe-line of his right to the exclusive use of it except as an exercise of the police power.⁸ In view of the recent decisions of the Supreme Court the earlier doctrine that this power extends only to legislation relating to health, morals, and safety must be regarded as obsolete.⁹ It is now declared to include measures held by "strong and preponderant opinion to be greatly and immediately necessary for the public welfare."¹⁰ It does not, however, enable the

ware & Hudson Co., 213 U. S. 366, 406, 416, 29 Sup. Ct. 527, 535, 539. See also 21 HARV. L. REV. 595, 597.

⁵ Lottery Case, *supra*; Hoke v. United States, 227 U. S. 308.

⁶ Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96; United States v. Delaware & Hudson Co., *supra*.

⁷ The right to engage in interstate commerce is not derived from the Constitution but existed prior to it. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 211; *Hoxie v. N. Y., N. H. & H. R. Co.*, 82 Conn. 352, 364, 73 Atl. 754, 759. It is therefore protected by the Fifth Amendment, and the mere fact that the power of Congress to regulate it is express does not make any regulation of commerce due process of law, but simply transfers to Congress the power previously possessed by the states. See *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 410, 26 Sup. Ct. 66, 67. See 21 HARV. L. REV. 595 *et seq.*; 22 HARV. L. REV. 250, 251. It is well settled that the Fifth Amendment prevents Congress from using its power over interstate commerce to take private property for public use without just compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622; *United States v. Lynah*, 188 U. S. 445, 23 Sup. Ct. 349.

⁸ At common law no one could be forced to assume the burdens of common carriage unless he professed to carry for the public. *Allen v. Sackrider*, 37 N. Y. 341. See *Faucher v. Wilson*, 68 N. H. 338, 339, 38 Atl. 1002, 1003. It would seem clear that to take away this right to use their property for their private business exclusively deprives the pipe-line owners of that property. See *Weems Steamboat Co. v. People's Co.*, 214 U. S. 345, 355, 29 Sup. Ct. 661, 663.

⁹ *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 26 Sup. Ct. 341; *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289.

¹⁰ See *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188. This extension of the police power seems entirely logical. This power has been said to be "but another name for the power of government." *Mutual Loan Co. v. Martell*, 222 U. S. 225, 233, 32 Sup. Ct. 74, 75. Under our Constitution this power cannot be exercised in such a way as to deprive people of their property except to provide for some great public need. In an individualistic era it was generally believed that except in a limited class of cases governmental intermeddling was neither necessary nor desirable. But in recent years the popular conception of the function of government has been radically altered, and, consequently, we must alter also our notions of the scope of the police power, the power to provide what is needful for the social welfare.

state to take private property for public use without just compensation,¹¹ and thus the mere fact that the public desires to make use of pipe-lines is not a sufficient justification for compelling them to be devoted to common carriage. There must be something inherently opposed to public policy in their exclusive use by their owners to justify the prohibition of such a use.

It appears from the findings in the principal case that the expense of constructing pipe-lines and the enormous difference between the cost of transportation by them and that by any other agency give the existing pipe-lines a virtual monopoly of the transportation of oil, a situation of which they take advantage by insisting that all the oil which they transport be sold to them at the wells, thus controlling the market for crude oil as well as its transportation. At common law such a monopoly as this would be entirely legal since it does not involve any contracts in restraint of trade, but is merely the legitimate use of a position of economic advantage.¹² Nevertheless, the rapidly changing conditions of modern business have given rise to a strong popular conviction of the undesirableness of many business practices heretofore regarded as legitimate, and there would seem to be no reason why under the broad definition of the police power above laid down these convictions may not be embodied in constitutional legislation.¹³ Although it cannot be said that all forms of monopoly are objectionable, a situation in which the producers of a commodity cannot get their goods to market except by selling them to the carrier is certainly anomalous, and the declaration of Congress that a remedy is needed does not seem unreasonable. In so far as the present statute applies to those who are now common carriers of oil in a physical sense the remedy provided of making them common carriers in a legal sense as well seems a proper one. But the statute includes also those who merely transport oil produced by their own wells, a proceeding which is hardly opposed to public policy.¹⁴ Nor can it be argued that the prohibition of the entire business of transporting oil is a reasonable or necessary means of accomplishing the legislative purpose,¹⁵ for there would probably be no difficulty in distinguishing

¹¹ *Monongahela Navigation Co. v. United States*, *supra*.

¹² The common law denounced contracts in restraint of trade and other practices tending to create monopoly rather than monopoly itself. See *Standard Oil Co. v. United States*, 221 U. S. 1, 55, 31 Sup. Ct. 502, 514. See FREUND, POLICE POWER, § 353.

¹³ The legality of different sorts of monopolistic practices has always been subject to change in accord with altered economic conditions and ideas. See *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 481, 13 N. E. 419, 421; *Nordenfelt v. Maxim Nordenfelt, etc. Co.*, [1894] A. C. 535, 553, 564. In recent years very stringent statutes directed against monopolizing have been held constitutional. *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25; *Waters Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220.

¹⁴ There may also be pipe-lines which, though they carry oil for others, do so by private contract and not as common carriers. Since no such lines were involved in the principal case, it is hardly necessary to discuss the constitutionality of the act with reference to them.

¹⁵ It is true that a legislature may in many cases prohibit a business which may be conducted in an innocent and proper manner, if it reasonably believes such prohibition to be necessary to the suppression of some genuine evil. *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425; *Purity Extract Co. v. Lynch*, 226 U. S. 192. But the means used must be "reasonably necessary for the accomplishment of the legislative purpose

this class of oil-producers from pipe-line carriers in the exercise of a monopoly. Since the act cannot well be regarded as divisible, the inclusion of all pipe-line carriers would seem to render it unconstitutional.

RELATION OF PRICE *v.* NEAL TO THE DOCTRINE OF PURCHASER FOR VALUE WITHOUT NOTICE. — The rule of *Price v. Neal* which denies the right of a drawee of a bill of exchange or a check to recover money paid under a mistake as to the genuineness of the drawer's signature is firmly established,¹ but text writers have disputed its soundness,² or acquiesced only on the ground of policy.³ It is now generally agreed that the holder of the instrument does not warrant its genuineness by surrendering it for payment even though he signs the instrument in acknowledgment thereof.⁴ The present criticism of the rule is ultimately based upon the notion that the buying of the instrument and the payment by the drawee are distinct transactions which should be viewed separately.⁵ Thus it is urged that the competing equities are not in the same *res*, the holder's equity being in the purchase price paid for the instrument, while the drawee's equity is in the sum paid to the holder.⁶ It may be conceded that as a matter of mercantile technique there are two different transactions. But as a matter of substance they constitute a single purchase. The holder buys the instrument itself only for reasons of commercial convenience. The real thing bargained for is payment by the drawee. If instead of an order for money, he had bought an order for a conveyance of Blackacre, the substance of the transaction would be obvious.⁷ The

and not unduly oppressive upon individuals." See *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 501. See also *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561, 593, 26 Sup. Ct. 341, 350. It is doubtful, however, whether any of the petitioners in the present suit can raise this objection, since all of them, save perhaps the Uncle Sam Oil Co., were found to be extensive purchasers of crude oil.

¹ For a collection of the authorities see the article by Professor Ames in 4 HARV. L. REV. 297, and the recent text on QUASI CONTRACTS by Woodward, §§ 80-92.

² See MORSE, BANKS AND BANKING, § 464; 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1361; KEENER, QUASI CONTRACTS, 154-158, n.

³ See WOODWARD, QUASI CONTRACTS, § 87.

⁴ See 17 HARV. L. REV. 580; 56 AM. L. REG. (N. S.) 122. But see 2 DANIEL, NEGOTIABLE INSTRUMENTS, 5 ed., § 1361; 58 CENT. L. J. 69.

Similarly, a bank receiving payment of a draft with a forged bill of lading attached does not warrant the genuineness of the bill of lading. *Leather v. Simpson*, L. R. 11 Eq. 398; *Goetz v. Bank of Kansas City*, 119 U. S. 551, 7 Sup. Ct. 318. See WILLISTON, SALES, § 435. These cases are also important because they demonstrate that the rule of *Price v. Neal* is not based upon the drawee's knowledge of the drawer's signature.

⁵ See KEENER, QUASI CONTRACTS, 156; WOODWARD, QUASI CONTRACTS, §§ 84, 134.

⁶ See WIGMORE, SUMMARY OF QUASI CONTRACTS, 25 AM. L. REV. 695, 706, n.; WOODWARD, QUASI CONTRACTS, § 84.

⁷ Cf. *People v. Swift*, 96 Cal. 165; *State v. Wells, Fargo & Co.*, 15 Cal. 336. See 4 HARV. L. REV. 310, n.

A bill of exchange or a check even though genuine is only an order. It does not give the holder a right against the drawee. *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank of London*, 34 L. T. R. 735; *Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152. *Contra*, *Munn v. Burch*, 25 Ill. 35.

fact that the property right is obtained directly and not through the wrongdoer should make no difference in considering the merits of the parties. If the wrongdoer stole the money from the drawee, he would have no more right to it equitably than the forged order gave him, and the drawee would be no more responsible for his possession of the money than for his drawing of the order. Yet if he paid the money in due course, the person who received it would admittedly be entitled to keep it. Now if the wrongdoer accomplishes his purpose by means of a forged order instead of a trespass, is not the innocent purchaser who receives payment in the same position equitably?⁸ The device of an order simply expands the transaction and makes it triangular.⁹ It affords no reason for changing the substantive rights of the parties.¹⁰

An examination of the true basis of the doctrine of purchaser for value without notice makes clearer the correctness of its application in *Price v. Neal*. The statement that the competing equities are not in the same *res* is misleading. Even in the typical case where one buys property from a trustee, the purchaser does not succeed because he has an equity in the property, strictly speaking. Had he failed to obtain the property, the *cestui* would be preferred. This is usually explained by reciting the maxim that as between equal equities the prior in time shall prevail. But since two mutually exclusive interests cannot exist in the same property, this really means that there is only one equity in the property, that of the *cestui*. So far as the property is concerned, the purchaser simply has the merit of having paid value for it innocently. Yet if he obtains the property, he may keep it. For, since equity is supplemental to the law and modifies the legal situation only when necessary to achieve justice, it cannot properly deprive him of property which he has acquired for value innocently.¹¹ Consequently, his position is invulnerable. The purchaser of a forged order who receives payment from the drawee without notice of the fraud is in substantially the same position. He has the title to the money, the merit of having paid value for it to the wrongdoer, and a clear conscience.

But even conceding that the purchase of the instrument is a distinct transaction, the purchaser's automatic loss of his claim for restitution against the wrongdoer upon receiving payment from the drawee might fairly be advanced as a reason for regarding him as a purchaser for value. He cannot retain both the payment and the right to restitution. He already has the payment. The fact that he may repudiate the payment and seek restitution, while it presents a logical difficulty in finding value,

⁸ An assignee for value of an invalid claim is allowed to keep what he collects from the obligor without notice of the invalidity of his claim. *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Youmans v. Edgerton*, 91 N. Y. 403.

⁹ It makes no difference that the instrument was negotiated before collection by the innocent holder for value, the only effect being to lengthen the fraudulent transaction. *Neal v. Coburn*, 92 Me. 139, 42 Atl. 348.

¹⁰ A somewhat similar difficulty has been experienced in considering whether a payee of a negotiable instrument may be a *bonâ fide* purchaser. Some courts have considered that the mere form of the transaction makes it impossible. *Vorce v. Rosenberry*, 12 Neb. 448, 11 N. W. 879; *Hathaway v. County of Delaware*, 185 N. Y. 368, 78 N. E. 153. But the contrary is well recognized. *Watson v. Russell*, 3 B. & S. 34; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646. See 23 BANK. L. J. 595.

¹¹ *Boone v. Chiles*, 10 Pet. (U. S.) 177, 210; *Gerrard v. Saunders*, 2 Ves. 454, 458.

should make no more difference than it does in the case of a defrauded purchaser, or an infant. Both may avoid their transactions, yet both are accorded the benefit of the doctrine of purchaser for value. Therefore where the circumstances are such that the conscious acceptance of title is unnecessary, even though there be a right to repudiate, the automatic loss, also, of a valuable claim to restitution should be value as much as a conscious surrender.¹² Thus in a recent case where the wrongdoer who because of a previous misappropriation was under a duty to remove an assessment lien, did so by means of a forged check payable to the city collector, the owner of the property though ignorant of the lien was allowed to retain the benefit of its discharge as against the defrauded drawee. *Title Guarantee & Trust Co. v. Haven*, 139 N. Y. Supp. 207 (Sup. Ct., App. Div.).¹³

MARTIAL LAW. — Military jurisdiction is of three kinds.¹ The first may be called military law and consists of a body of rules governing the internal affairs of the army. By the United States Constitution the power to make these rules is expressly vested in Congress.² The second consists of those customs and treaties which govern dealings with belligerent armies and peoples and are recognized as a part of international law.³ The third type is martial law, to which in time of need all persons may be subject, and which, it has been well said, "is nothing more nor less than the will of the general who commands the army."⁴ In view of the universal demand for security to person and property which has everywhere expressed itself in the form of constitutional guarantees against interference with individual rights, it is often of the utmost importance to determine the source and scope of this arbitrary jurisdiction.

Unfortunately the authorities have taken conflicting views on these questions. In the leading case of *Ex parte Milligan*, Chief Justice Chase suggested that the United States Constitution gave Congress the power to declare martial law by implication from the powers to declare war,

¹² By the better view the cancelation of a pre-existing debt constitutes value. The argument that the debt will be revived if the property is taken from the purchaser simply amounts to saying that the value can be restored, but there is no recognized principle that a purchaser for value shall not be allowed to hold property transferred to him if the value which he has given can be and is restored to him. See WILLISTON, SALES, § 620.

¹³ Similarly, where a trustee misappropriates funds of one trust and later pays the *cestui* with funds of another trust, the *cestui* may keep the payment. *Thorndike v. Hunt*, 3 DeG. & J. 563; *Taylor v. Blakelock*, L. R. 32 Ch. 560.

Where bonds negotiable by delivery are stolen, sold to a *bonâ fide* purchaser, regained by fraud, and then restored to the original owner, he may keep them although he was ignorant of the whole transaction. *London & County Banking Co. v. London & River Plate Bank*, L. R. 21 Q. B. D. 535. Cf. *Nassua Bank v. National Bank of Newburgh*, 159 N. Y. 456, 54 N. E. 66.

¹ See *Ex parte Milligan*, 4 Wall. (U. S.) 2, 141, 142; LIEBER, *THE JUSTIFICATION OF MARTIAL LAW*, 1.

² Art. I, § 8, cl. 14.

³ See WILSON, *HANDBOOK OF INTERNATIONAL LAW*.

⁴ See *In re Egan*, 8 Fed. Cas. No. 4303, by Nelson, J.

regulate the army, and suspend the writ of *habeas corpus*.⁵ But the majority of the court took the view that martial law could be justified only by necessity at the actual seat of war where the civil authorities were incapable of action.⁶ Following this line of thought to its logical conclusion, Sir Frederick Pollock has suggested that martial law is simply one application of the common-law doctrine which permits certain injuries to be inflicted because of public necessity,⁷—that doctrine by which the destruction of property to prevent the spread of a conflagration is justified. Of course the necessity need not have existed in fact. It is a sufficient justification that the actor reasonably believed it to exist.⁸ Injuries to personal and property rights should be treated alike⁹ in this respect; in either case the interference when thus justified should be regarded as due process of law.¹⁰

The practical difference between the two theories is very great. If Chief Justice Chase's theory were properly applicable to the case, the courts could give no remedy for the abuse of the power, as it is expressly vested in a coördinate branch of the government.¹¹ The only remedy would be by impeachment or at the polls. If martial law can be supported solely on the latter theory, however, the acts of a military authority are reviewable by the courts, immediately if they are in full operation; if not, as soon as civil tribunals are reestablished. It was once thought that martial law could never be a justification in a district where courts were actually sitting.¹² But the modern cases are recognizing that the proper test is whether or not the civil authorities are competent to handle the situation.¹³ Again, if authority can only be derived from a constitution, no matter how great the necessity might be, martial law

⁵ See *Ex parte Milligan*, 4 Wall. (U. S.) 2, 136, 141. It is to be observed that Congress undoubtedly has express authority to suspend the writ of *habeas corpus* "in cases of rebellion or invasion" when in its judgment public safety requires it. But the suspension of the writ merely justifies the detention of a prisoner duly arrested. It does not justify the arrest, trial, or punishment by military authorities. See *Ex parte Milligan*, 4 Wall. (U. S.) 2, 125, 126, 137.

⁶ See *Ex parte Milligan*, 4 Wall. (U. S.) 2, 127.

⁷ See 18 LAW QUARTERLY REVIEW, 152. But see 18 LAW QUARTERLY REVIEW, 133, where the other view is developed by Mr. H. E. Richards.

⁸ See *Mitchell v. Harmony*, 13 How. (U. S.) 115, 135. In the case of a military necessity the fact that a superior officer ordered an act done would go a long way towards giving the subordinate reasonable cause to think a necessity existed.

⁹ See 18 LAW QUARTERLY REVIEW, 133, 137.

¹⁰ Cf. *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235, in which it was held that the arrest and imprisonment of a striker under plea of martial law, if sustained by the state courts, did not violate the Fourteenth Amendment. It has long been settled that the guarantee to the states in the federal Constitution of a republican form of government will not prevent a state from declaring martial law. *Luther v. Borden*, 7 How. (U. S.) 1.

¹¹ See an article by H. C. Carbough, 7 ILL. LAW REV. 479, 481; LIEBER, THE JUSTIFICATION OF MARTIAL LAW; War Dep't, Document No. 79, pp. 6-11.

¹² See an article on the history of martial law by W. S. Holdsworth, 18 LAW QUARTERLY REVIEW, 117. Cf. *Bean v. Beckwith*, 18 Wall. (U. S.) 510; *In re Egan*, *supra*; *Ex parte Milligan*, *supra*.

¹³ Cf. *In re Boyle*, 6 Ida. 609, 57 Pac. 706; *In re Moyer*, 35 Colo. 159, 85 Pac. 190; *Ex parte Marais*, [1902] A. C. 109. See 18 LAW QUARTERLY REVIEW, 152, 155. If the old rule is applied, the court finds itself in the absurd situation of having to issue a writ which it has no *posse commitalis* to enforce, and which it expects and hopes will be disobeyed. *Ex parte Moore*, 64 N. C. 802. Cf. *Ex parte Merriman*, Taney's Rep. 246.

could not exist in any state unless the constitution thereof by implication at least permitted the executive or legislative department to declare it.¹⁴ In the constitutions of several states the bill of rights is expressly declared to have the same force in time of war as in time of peace. During the recent strikes in West Virginia, whose bill of rights contains this clause, the governor with the authority of the legislature declared martial law to exist, and caused rioters to be arrested and imprisoned by a military commission. It was held that necessity justified this action, and the writ of *habeas corpus* was refused though the constitution expressly declared that the writ should never be suspended. *State ex rel. Mays v. Brown*, 77 S. E. 243 (W. Va.). It is submitted that this result is sound. As necessity may justify an order to fire upon a mob, so it may justify imprisoning a rioter if the civil authorities are still incompetent to deal with his case. But for the reasons mentioned above the court seems utterly inconsistent in concluding that the governor's action was not reviewable.¹⁵ The result of this view is to make the governor judge of the necessity of his own acts, thus nullifying all constitutional safeguards, and leaving the liberty of citizens subject to the caprice of a military despot.

THE LEGAL STATUS OF UNBORN CHILDREN. — The New York Appellate Division has recently laid down *obiter* the doctrine that a child may recover for prenatal injuries. *Nugent v. Brooklyn Heights R. Co.*, 139 N. Y. Supp. 367 (Sup. Ct., App. Div.).¹ In determining whether a child *en ventre sa mère* is a legal person with capacity for rights, it is helpful to examine the treatment accorded him in other departments of the law. He takes under a devise to children "living"² or "born"³ at a given time. This does not, however, involve the recognition of a child *en ventre sa mère* as a separate existent entity, but is purely a rule of construction based on the ground that "such children come within the motive and

¹⁴ See *Ex parte Milligan*, 4 Wall. (U. S.) 2, 137, 141.

¹⁵ Various executive civil officers are often given power to call out the troops to assist the police in keeping order and enforcing the civil law. The discretion of the officer in whom this power is vested is in such a case conclusive as to whether or not military assistance is necessary. *Ela v. Smith*, 5 Gray (Mass.) 121; *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484. For this is a power vested in a coördinate branch of the government by the Constitution and laws of the United States or of the state, as the case may be, and the court has no right to substitute its judgment for that of the official to whom discretion is given. But this is a very different situation from that in the principal case, where the governor, acting in excess of his express powers, has arrested a citizen in disregard of civil law, and caused him to be tried by a military commission.

¹ In the particular case the injuries were inflicted by a carrier who was ignorant of the mother's pregnancy. The court denied recovery on the ground that the plaintiff was not a passenger. See *Walker v. Great Northern Ry. Co. of Ireland*, L. R. 28 Ir. 69. If the difficulties as to regarding the unborn child as a person could be overcome, it might well be argued that the known fact that a considerable portion of the female traveling public may be pregnant should justify the imposition on the carrier of a duty of care towards the infant.

² *Doe d. Clarke v. Clarke*, 2 H. Bl. 399.

³ *In re Salaman*, [1908] 1 Ch. 4. *Enfants en ventres ses mères* do not, however, come within the description "children born" unless it is for their benefit. *Villar v. Gilbey*, [1907] A. C. 139.

reason of the gift.”⁴ Similarly he comes within the Statute of Distributions,⁵ and is included in the terms of Lord Campbell’s Act allowing suit by children for the death of their father.⁶ In a sense it may be said that an unborn child is treated as living for the purpose of the Rule against Perpetuities⁷ and the revocation of wills.⁸ A more accurate statement of the result of the cases is that the limitation imposed by the Rule against Perpetuities is twenty-one years and the lives of persons conceived at the time of the gift plus the period of gestation of the donee;⁹ and that a will is revoked by the subsequent marriage of the testator and the conception of a child afterwards born alive. In like manner it is more nearly correct to say that in the case of children *en ventres ses mères* an exception is made to the rule that contingent remainders must vest before the termination of the preceding estate,¹⁰ than that the law of real property here recognizes the unborn child as an existent person.¹¹ Indeed, quite the contrary is shown by the well-settled rule that in the interim between the death of a testator devising land to a child *en ventre sa mère* and the birth of the child, the heir-at-law is entitled to the rents and profits.¹² There is mention in the books of one Lutterel’s

⁴ See *Villar v. Gilbey*, [1907] A. C. 139, 144, 145.

⁵ *Wallis v. Hodson*, 2 Atk. 114. This case like many in this connection relies on the maxim of the civil law, *nasciturus pro nato habetur*. This has also been urged to support the recovery by a child for prenatal injuries. See 1 BEVEN, NEGLIGENCE, 3 ed., 75. The civil law-writers lay down as a general proposition that an *enfant en ventre sa mère* is to be considered as born when for his benefit. The instances given, however, are always concerning the devolution of property, the civil status of the child when born and the like. The civil lawyers do not seem to have adverted to this precise situation. There is no reason to suppose that a recovery would be allowed. See 2 SAVIGNY, SYSTEM DES RÖMISCHEN RECHTS, § 62; 1 AUBREY ET RAU, DROIT CIVIL FRANÇAIS, § 53; 8 LAURENT, DROIT CIVIL FRANÇAIS, §§ 535, 536. The German Civil Code expressly provides that a person’s capacity for rights shall date from complete birth. Certain specific instances are marked out in which the rights of the child after birth are to be determined as though he had been born when conceived; none, however, covers the case of prenatal injuries to the *foetus*. 1 PLANCK, BÜRGERLISCHES GESETZ-BUCH, § 1; 1 DERNBURG, BÜRGERLISCHES RECHT DES DEUTSCHEN REICHS UND PREUSSENS, § 49.

⁶ *The George and Richard*, L. R. 3 A. & E. 466; *State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111; *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 14 S. W. 1021. It is significant that in *The George and Richard*, *supra*, the decree awarding damages was made conditional upon the child’s birth. If the child were really a person there seems no reason why the decree should not have been absolute, the damages to go to the child’s administrator in case he should not be born alive.

⁷ *Long v. Blackall*, 7 T. R. 100; *In re Wilmer’s Trusts*, [1903] 1 Ch. 874, [1903] 2 Ch. 411.

⁸ *Doe d. Lancashire v. Lancashire*, 5 T. R. 49.

⁹ And possibly the person, if there be such, whose minority constitutes the period of twenty-one years. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 222.

¹⁰ See LEAKE, PROPERTY IN LAND, 2 ed., 238.

¹¹ In *Reeve v. Long*, 3 Lev. 408, the House of Lords decided, contrary to the opinion of all the judges, that a contingent remainderman under a will who was *en ventre sa mère* at the termination of the preceding estate was on birth entitled to the land. The same rule was laid down by an act of Parliament as to grants *inter vivos*. 10 & 11 WM. III, c. 16.

¹² *In re Mowlem*, L. R. 18 Eq. 9. And so the rents in the interval between the death of the ancestor and the birth of his posthumous son go to the presumptive heir. *Basset v. Basset*, 3 Atk. 202; *Richards v. Richards*, Johns. 754. In *Basset v. Basset*, *supra*, the contingent remainderman under a deed who was *en ventre sa mère* at the termination of the preceding estate was held entitled to the rents from that period,

Case,¹³ in which an injunction to stay waste was granted on behalf of a child *en ventre sa mère*. In the desire of a court of equity, however, to restrain the unconscionable use of a legal power,¹⁴ the consideration of whether anyone existed in whose favor the right might be exercised may well have been disregarded. The analogies of the criminal law have been urged in support of the infant's claim for damages. Injuries to a child while in the womb of its mother which result in its death after having been born alive may support an indictment for manslaughter or murder.¹⁵ This is correct on any theory. The defendant's act has caused the death of a human being; it is then homicide, regardless of whether or not the victim was in being at the time the act was done. On the other hand the holdings that no injuries to a child *en ventre sa mère* can be homicide unless the child is born alive¹⁶ are conclusive against the contention that the criminal law recognizes the unborn child as a person.

Judicial decision has thus consistently adopted the ordinary conception that a person's existence dates from his birth. It follows that he cannot recover for prenatal injuries although they caused his birth in a deformed condition. For there has been no injury to him as an independent entity, since his condition as a result of the defendant's act is at no time worse than at any previous point in his existence.¹⁷ Such has been the result reached by all the decided cases.¹⁸

PRICE RESTRICTION ON THE RE-SALE OF CHATTELS. — Contracts enabling a patentee to control the price in re-sales of articles manufactured under his patent violate neither the common-law prohibition

since the Act of 10 & 11 Wm. III, *supra*, expressly provided that in such a case the child should be treated as born.

¹³ Cited in *Hale v. Finch*, *Precedents in Chancery* 50. See also *Robinson v. Litton*, 3 Atk. 209, 211.

¹⁴ As, for example, the restraining of a tenant without impeachment of waste from making an unreasonable use of the property. The cases are collected in 1 AMES, CASES ON EQUITY, 469.

¹⁵ 3 INST. 50; *Rex v. Senior*, 1 Moody C. C. 346; *Queen v. West*, 2 C. & K. 784, 44 Sol. J. 52.

¹⁶ *Rex v. Poulton*, 5 C. & P. 329; *Rex v. Enoch*, 5 C. & P. 539. See 1 RUSSELL, CRIMES, 7 ed., 663.

¹⁷ It might be urged that in estimating ordinary damages the plaintiff's present condition is compared not exclusively with his prior condition, but with that in which he would now be except for the defendant's act. But this is merely a convenient way of comparing his prior condition and its possibilities of improvement with his present condition. Nor has any such principle ever been the basis of a substantive cause of action.

¹⁸ *Walker v. Great Northern Ry. Co. of Ireland*, L. R. 28 Ir. 69; *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14; *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N. E. 638; *Gorman v. Budlong*, 23 R. I. 169, 49 Atl. 704. But see *Villar v. Gilbey*, [1907] A. C. 139, 144. The text-writers are *contra*. See 1 BEVEN, NEGLIGENCE, 3 ed., 73-76; SALMOND, TORTS, 2 ed., 349, 350. Very likely the courts have been influenced by a fear of trumped-up damage suits. *Walker v. Great Northern Ry. Co. of Ireland*, L. R. 28 Ir. 69, 81, 82. The considerations which have led to a denial of recovery in many jurisdictions for injuries negligently inflicted without physical contact are multiplied in this case. *Spade v. Lynn & Boston R. Co.*, 168 Mass. 285, 47 N. E. 88. *Contra*, *Dulieu v. White*, [1901] 2 K. B. 669.

against restraint of trade¹ nor the Sherman Anti-Trust Act.² This follows from the exclusive right to use, make, and sell expressly granted to the patentee by the patent statute³ in consideration of a complete publication after the period of exclusive use. To the extent that he restricts the grant of any of these rights he retains the right to forbid others to make complete use of the article, and whosoever violates, with notice, the restrictions imposed by the patentee is an infringer.⁴ That this is the true reason for the exemption from the rule against restraint of trade is apparent from the fact that the exemption has never been extended to contracts respecting patented articles which have once passed beyond the domain of the patent by an original sale without restriction.⁵ Furthermore, although a contract restricting the use or sub-sale of a chattel is not allowed at common law so to attach to a chattel as to obligate a purchaser by operation of notice,⁶ thus operating as a restraint on alienation, yet this rule has been held not to apply to chattels protected by a patent, because the statute in effect permits that very thing to be done.⁷

Despite the close similarity between patents and copyrights, there is such a wide difference in the spirit and wording of the patent and copyright⁸ statutes that the law on this matter might have been quite different with regard to copyrighted articles.⁹ The weight of authority, however, is to the effect that a contract in regard to such an article is not in restraint of trade,¹⁰ at least where it is directly between a publisher and a single vendee with reference to a sub-sale price.¹¹ It would seem, however, that the owner of a copyright does not have the right to hold a purchaser merely because the latter has notice of an existing obligation.¹²

In the case of ordinary chattels, since a restrictive agreement cannot attach to the chattel itself, the only question is whether an action on the contract is barred because the contract is in restraint of trade.¹³ Not

¹ *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424; *National Phonograph Co. v. Schlegel*, 128 Fed. 733.

² U. S. COMP. STAT., 1901, p. 3200; *Bement v. National Harrow Co.*, 186 U. S. 70.

³ U. S. COMP. STAT., 1901, § 4884.

⁴ Where the imposition of conditions constitutes a contract between the patentee and his direct licensee, the patentee may, of course, have a double remedy, — an action in tort for infringement, or an action in contract. *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288; *Victor Talking Machine Co. v. The Fair*, *supra*.

⁵ See *Park & Sons Co. v. Hartman*, 153 Fed. 24, 32.

⁶ *Prates v. Campbell*, 110 Ky. 23, 60 S. W. 918. See *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 691, 61 N. E. 219. For the principle underlying this rule, see *CO. LIT.*, § 360.

⁷ *The Fair v. Dover Mfg. Co.*, 166 Fed. 117; *New Jersey Patent Co. v. Schaeffer*, 44 Fed. 437. See 6 ILL. L. REV. 357.

⁸ U. S. REV. STAT., §§ 4952, 4965, 4970.

⁹ See *Bobbs-Merrill Co. v. Straus*, 147 Fed. 15; 23.

¹⁰ See *Straus v. American Publishers' Association*, 177 N. Y. 473, 477, 69 N. E. 107, 108; *Murphy v. Christian Press Association*, 38 N. Y. App. Div. 426, 56 N. Y. Supp. 597. But see *Park & Sons Co. v. Hartman*, 153 Fed. 24, 31.

¹¹ *Murphy v. Christian Press Association*, *supra*.

¹² *Cf. Bobbs-Merrill Co. v. Straus*, 210 U. S. 339. In that case there was no contract, but there was a notice attached to the article that it was not to be sold below a certain price.

¹³ Chattels in whose production secret processes or other trade secrets have been

to be in restraint of trade, a restriction must not be so wide as to affect the public injuriously, and no wider than is necessary for the protection of the prior owner.¹⁴ The former requisite is unsatisfied if the restraint is total,¹⁵ and even a partial restraint must be merely ancillary to a principal contract.¹⁶ Whether a restraint is wider than is necessary to constitute a fair protection to the promisee must always be a question on the particular facts of each case.¹⁷ A single contract determining the re-sale price of chattels and not dealing with all such chattels in commerce is upheld.¹⁸ On the other hand, a system of contracts controlling the price of sales and re-sales has generally been held invalid.¹⁹ For any benefit to the original vendor is manifestly but an incident to the chief result, the benefit to his vendees and sub-vendees by the elimination of competition between them.²⁰ A recent California case takes a contrary view. *Ghirardelli Co. v. Hunsicker*, 128 Pac. 1041 (Cal.). The decision is curious in that the court, after finding that the contract was ancillary and that the provision resulted only in a partial restraint of the whole output of the commodity, reached its conclusion without any consideration of the question whether the plaintiff was being afforded more protection than he fairly required.

ADMISSIBILITY OF LEARNED TREATISES AS EVIDENCE.—A recent case discusses but declines to follow Professor Wigmore's suggestion¹ that medical books and other learned treatises be admitted as evidence of the opinions which they contain. *Denver City Tramway Co. v. Gawley*, 129 Pac. 258 (Colo., Ct. App.). In admitting the writings of an expert

utilized are subject to the same rules as ordinary chattels. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745. *Contra*, *Wells & Richardson Co. v. Abraham*, 146 Fed. 190. Such an owner is allowed to protect himself against betrayal of his secret by one who has received it through confidential relations. *Chadwick v. Covill*, 156 Mass. 190, 23 N. E. 1068; *Jarvis v. Knapp*, 12 Fed. 34; *Harrison v. Glucose Co.*, 116 Fed. 304. So also he is protected against breach of contract when the secret is communicated in confidence and under restrictions as to its use.

¹⁴ *Horner v. Graves*, 7 Bing. 735. See *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409.

¹⁵ *Cf. Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Swift & Co. v. United States*, 196 U. S. 395. This is true even though the public might not have much general interest in the restraint. *Montague & Co. v. Lowry*, 193 U. S. 38.

¹⁶ *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 355; *Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64.

¹⁷ *Horner v. Graves*, *supra*. See *Nordenfeldt v. Maxim Nordenfeldt Co.*, [1894] A. C. 535, 567.

¹⁸ *Elliman v. Covington*, 2 Ch. D. 275; *Garst v. Harris*, 177 Mass. 72.

¹⁹ *Dr. Miles Medical Co. v. Park & Sons Co.*, *supra*; *Park & Sons Co. v. Hartman*, *supra*. See 24 HARV. L. REV. 268. *Contra*, *Walsh v. Dwight*, 58 N. Y. 91; *Park & Sons Co. v. National Wholesale Druggists*, 175 N. Y. 1, 67 N. Y. S. 136. See 24 HARV. L. REV. 244.

²⁰ See *Park & Sons Co. v. Hartman*, 153 Fed. 24, 45. The cases are sometimes supported on the ground that the effect of the agreement is not different from that of a contract between competing dealers fixing prices. Such contracts are universally held invalid. *People v. Sheldon*, 139 N. Y. 251; *Craft v. McConoughy*, 79 Ill. 346.

¹ 26 AM. L. REV. 390; WIGMORE, EVIDENCE, §§ 1690 *et seq.*

who is not present, the suggested reform would create a new exception to the hearsay rule. Although the doctrines and exceptions which make up the law of evidence have developed separately and along strict lines, yet today the principles underlying the admission of testimony are firmly fixed in the practice of the court room. It does not seem possible or wise to change these rules by judicial legislation unless the change merely involves the application of principles already recognized. It is therefore first necessary to determine whether the theories underlying the admission in somewhat analogous cases of documentary evidence can be properly extended to that of learned treatises. The admission of almanacs,² mortality tables,³ and some similar records is based on one of two grounds. The courts sometimes take judicial notice of the fact so stated;⁴ the records would then be merely reminders. When this theory is not applicable, it is said that the court takes judicial notice of the authenticity of the documents as evidence of the facts in issue.⁵ This seems merely to state a reason for making at least a technical exception to the hearsay rule. The justification seems founded on the almost mechanical precision attainable in recording such matters as the mathematical averages of mortality tables, by a process of reasoning similar to that which recognizes the accuracy of photography to be sufficient to admit pictures as proof of the object reproduced.⁶ Obviously photographic certainty does not obtain in the case of learned treatises. Another analogous exception to the hearsay rule admits evidence of reputation in cases where the fact to be proved, present or past, is of general or public interest.⁷ When the matter is very far in the past, resort may be had to histories as evidence of present reputation of past facts.⁸ The qualification for such books, however, is not the wisdom of the writer, but a sufficiently wide circulation to make the views contained fairly typical of contemporary public opinion. Furthermore, none of the cases discussed relate to opinion evidence. The need for the safeguard of cross-examination, which is one of the chief reasons for the hearsay rule, is peculiarly fundamental in the admission of expert opinion. It is indispensable in elucidating the expert's meaning and in testing his competency. It is also necessary in order to show on what the opinion is premised, so as to eliminate evidence based on facts not proved to the satisfaction of the jurors.⁹ It seems clear,

² See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 291 *et seq.*; Munshower v. State, 55 Md. 24.

³ See WIGMORE, EVIDENCE, § 1698, n. 1.

⁴ See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 306.

⁵ See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 306; Ennis v. Smith, 14 How. (U. S.) 400, 426.

⁶ See Udderzook v. Commonwealth, 76 Pa. St. 340.

⁷ See WIGMORE, EVIDENCE, § 1586.

⁸ See WIGMORE, EVIDENCE, § 1597; Morris v. Lessee of Harmer's Heirs, 7 Pet. (U. S.) 554, 558.

⁹ It should be observed that some expert testimony might be admitted by one of the exceptions to the hearsay rule, as when made in the discharge of some regular duty or business, without the opportunity of cross-examination. But see Bradford v. Cunard Steamship Co., 147 Mass. 55, 57, 16 N. E. 719, 720. This, however, illustrates the inevitable logical consequences of the exceptions themselves, rather than any relaxation of the courts toward the admissibility of hearsay opinion evidence.

therefore, that the proposed exception would violate the principles of the law of evidence.

But it is urged that the practical advantages warrant a departure by act of the legislature from the principles of the past. It is said that time and money will be saved. But first it must be determined what books shall be admitted. Obviously none but specialists can pass upon the standing of specialized writings. Whereas at present experts wrangle as to the correct opinion, the proposed innovation would merely shift the ground of their contention to the correctness of the author. And when one side has proved the qualifications of a learned treatise, nothing is to prevent the party opponent from producing an equally learned work by a dissenting author. Nor does the argument appear sound that the admission of this evidence will make more readily available to the court the latest results of scientific research. A real expert is presumably posted on the latest authorities, and has the additional advantage of being able to act as interpreter. The opinion itself may be based on a treatise, and the actual exclusion of the particular volume deprives the court of little advantage. The strongest practical argument for the exception is perhaps that learned treatises are free from the prejudice so frequently seen in experts. But any advantage seems to be more than counterbalanced by the danger that the way may be opened to confusing the jury either by deliberate mystification or innocent misapprehension in the use of technical excerpts. In short, no advantage seems to suggest itself sufficient to justify an innovation so unwarranted by the present rules of evidence and so liable to practical abuse in the court room.¹⁰

THE EFFECT OF A PARDON. — While, as has been often said, a pardon is granted of grace and not of right,¹ it must be assumed in considering its effect that the reason for granting a pardon to-day is not generally the mere personal favor of the pardoning power, but a recognition that the rigid rules of law as to crimes and punishments may fail to effect justice in individual cases. Thus later developments may make it appear that one legally found guilty was in fact innocent, or, if technically guilty, at least morally innocent. In other cases the peculiar physical condition of the guilty man or extenuating circumstances connected with the crime may justify a relief from further punishment.² Pardons,

¹⁰ The rule suggested by Professor Wigmore seems to have been adopted by judicial legislation in Alabama. *Stoudenmeier v. Wilson*, 29 Ala. 558, 565; *Merkle v. State*, 37 Ala. 139, 141; *Bales v. State*, 63 Ala. 30, 38; *Birmingham, etc. Co. v. Moore*, 148 Ala. 115, 125, 42 So. 1024, 1028. The Alabama rule appears to have originated from an Iowa case, *Bowman v. Woods*, 1 G. Greene (Ia.) 441, 444. But the doctrine no longer obtains in that state. *Bixby v. The Omaha, etc. Co.*, 105 Ia. 293, 75 N. W. 182; *Union Pacific R. Co. v. Yates*, 79 Fed. 584, 588. For jurisdictions where statutes allow the admission of books to prove facts of general notoriety and interest, see WIGMORE, EVIDENCE, § 1693, n. 1, 2.

¹ See *Roberts v. State*, 160 N. Y. 217, 222, 54 N. E. 678, 679; 3 INST. 233.

² Sometimes public policy requires that a large body of offenders shall be no longer considered criminals, as, for instance, after the Civil War when a general amnesty was granted to those who had joined in the rebellion.

however, for whatever reason given, are treated alike in effect. Courts of law do not look behind them to see why they were granted in individual cases.

It is clear that a pardon can have no retroactive effect. A pardoned convict can have no redress against the state for penalties already suffered, whether in the form of fine,³ imprisonment,⁴ or forfeiture of office.⁵ Having been legally convicted, a man cannot be said to have suffered a wrong from the state, for a pardon is not a determination that a conviction was erroneous.⁶ Moreover, being an act of grace toward an individual, a pardon cannot affect the rights of third parties which have vested because of the conviction.⁷

It is clear, however, that a full pardon should not only relieve from all future punishment prescribed for the offense,⁸ but from the various disabilities attached either by the common law or by statute to one convicted of the more serious crimes. Thus a pardon will remove a convicted man's disability as a voter, a juror, an executor, a guardian, or a witness.⁹ In view of the remission of punishment and the restoration of civil rights it has been often said that a pardon is a remission of guilt, and makes of one convicted a new man with new credit in the eye of the law.¹⁰ The courts are not entirely in harmony, however, as to whether after a full pardon any taint of criminality remains. Were the reasons for granting a pardon open each time to judicial examination, they would have an important bearing in many cases upon the justice of adopting one view or the other. It is well settled that a prior conviction of a witness may be offered in evidence to affect his credibility, although he may have been granted a full pardon.¹¹ In such a case, even where innocence is the reason for the pardon, no great injustice is done, because this evidence may be rebutted. Another interesting question, more doubtful on the authorities, is raised by a recent New York case. A statute provided that a person once convicted of a felony should suffer an increased punishment for a second offense. The defendant, having been granted a full pardon after a first

³ *Knote v. United States*, 95 U. S. 149; *Cook v. Freeholders of Middlesex County*, 26 N. J. L. 326.

⁴ *Roberts v. State*, *supra*.

⁵ *State v. Carson*, 27 Ark. 469.

⁶ See *Roberts v. State*, 30 N. Y. App. Div. 106, 109, 51 N. Y. Supp. 691, 693.

⁷ *Holliday v. People*, 10 Ill. 214. See *In re Deming*, 10 Johns. (N. Y.) 232. Penalties paid to third parties cannot be recovered. *Rucker v. Bosworth*, 7 J. J. Marsh. (Ky.) 645. An informer still retains his right to be paid any compensation he may have legally earned. *Rowe v. State*, 2 Bay (S. C.) 565.

⁸ *Osborn v. United States*, 91 U. S. 474.

⁹ *Wood v. Fitzgerald*, 3 Or. 568 (voter); *Puryear v. Commonwealth*, 83 Va. 51, 1 S. E. 512 (juror); *In re Raynor*, 48 N. Y. Misc. 325 (executor); *In re Deming*, 10 Johns. (N. Y.) 232 (guardian); *Diehl v. Rogers*, 169 Pa. St. 316, 32 Atl. 424. See 2 Hale, P. C. 278 (witness).

¹⁰ See *Ex parte Garland*, 4 Wall. (U. S.) 333, 380; *Ex parte Hunt*, 10 Ark. 284, 288; 1 BISHOP, CRIMINAL LAW, § 898. It was early held that a pardoned thief could bring an action of slander for being called a felon. *Cuddington v. Wilkins*, Hob. 81. In saying that a pardon makes of one convicted a new man the courts do not mean that the acts themselves leading up to a conviction are considered legally obliterated. Accordingly an attorney, who has been pardoned after conviction of a felony, may still be disbarred on the ground that his acts resulting in conviction also constituted professional misconduct. In the matter of —, Attorney, 86 N. Y. 563.

¹¹ *United States v. Jones*, 2 Wheeler Cr. Cas. 451; *Curtis v. Cochran*, 50 N. H. 242.

conviction, was again convicted of a felony. The court held that he must suffer the increased statutory penalty. *People v. Carlesi*, 139 N. Y. Supp. 309 (Sup. Ct., App. Div.). The opposite result seems to have been reached in all but one of the other jurisdictions where the question has arisen.¹² The reason for statutes providing increased punishment for second offenders is the greater criminality attaching to one who repeats an offense.¹³ The New York court recognizes the continuing existence of a criminal taint in spite of the pardon. Since no discretion is allowed by the New York statute in imposing the increased penalty, injustice might result if the pardon were based on innocence.¹⁴ It is submitted that the power to pardon should be broad enough completely to remove all taint of guilt. To have a lesser effect a pardon should be limited in terms.

TORT LIABILITY FOR BREACH OF CHILD-LABOR STATUTE. — The increasing number of child-labor laws in this country lends interest to a recent Alabama case under such a statute. A child employee was allowed to recover from the defendant employer damages for personal injuries although he obtained employment by falsely representing that he was above the statutory age. *De Soto Coal, Mining, & Development Co. v. Hill*, 60 So. 583 (Ala.). The statute in this case was peculiar in merely forbidding the employment of children under fourteen, without providing a penalty. Since the statute is not effective as a criminal statute, it seems that the legislature, in forbidding one class of persons to do affirmative acts affecting another, must have intended to create a civil liability to children employed.¹

In determining the exact limits of a right of action given in such general terms, the purpose of the legislature must be examined in order to decide what type of civil liability it is intended to impose. It seems that liability should not be confined to cases where the plaintiff's youth is the cause of his injury,² since the purpose of such a statute is to protect children from all the dangers of the prohibited employment.³ As a

¹² *Edwards v. Commonwealth*, 78 Va. 39; *State v. Martin*, 59 Oh. St. 212. See *Commonwealth v. Morrow*, 9 Phila. 583. *Contra*, *Commonwealth v. Mount*, 2 Duv. (Ky.) 93.

¹³ See *People v. Sickles*, 156 N. Y. 541, 547; *People v. Craig*, 195 N. Y. 190, 88 N. E. 38.

¹⁴ The only relief in such a situation, if the view of the New York court is adopted, would be a possible second act of grace in reducing the sentence.

¹ Where a statute provides only a penal liability for its breach, a civil right can scarcely be given by construction of the words. It seems rather that the courts in substance are creating a new cause of action because they recognize the policy which lies behind the criminal statute. See 26 HARV. L. REV. 531.

² There must always be causal connection between the act forbidden and the injury. See *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 464, 32 S. W. 460, 461; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 432, 87 N. E. 229, 233. But the employment of the child is legal cause of damage incidental to such work. *Third Vein Coal Co. v. Dielie*, 110 Ill. App. 684; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655, 41 S. W. 860; *Starnes v. Albion Mfg. Co.*, 147 N. C. 556, 61 S. E. 525; *Lenahan v. Pittston Coal Co.*, 218 Pa. St. 311, 67 Atl. 642.

³ *Rolin v. Reynold's Tobacco Co.*, 141 N. C. 300, 53 S. E. 891; *Third Vein Coal Co. v. Dielie*, *supra*.

practical matter such statutes will not abolish the abuses aimed at, if ignorance of the child's age is allowed as a defense. To hold employers liable, though they have used due care, may seem a harsh rule.⁴ But since it is necessary for the enforcement of a statute obviously intended to protect society against child-labor abuses thought to threaten its welfare, such a harsh liability seems within the legislative purpose.⁵ Furthermore, under such a statute contributory negligence should be no bar.⁶ The very purpose of the statute is to keep children out of places where their own heedlessness and inexperience will cause them harm. Since the enforcement of civil liability is merely a means of conserving the interests of society, a recovery should be allowed despite the contributory negligence of the particular plaintiff.⁷ Similar reasons require that such plaintiffs be not barred because they asked for employment.⁸ In a word, it seems clear that, to be consistent with the legislative purpose, the cause of action must be an absolute one, allowing recovery in every case of damage resulting from the forbidden act; not merely an action like that of negligence, resulting from a legislative extension of the standard of due care.

But in the principal case recovery was allowed where the plaintiff misrepresented his age. In support of this result, the same social interest which makes mine owners liable though ignorant of the infant's age, and which does away with the defense of contributory negligence, might be invoked. But if allowed there seems nothing to prevent a recovery of the same amount of damages by the defendant, in an action of deceit.⁹ The plaintiff would, therefore, be barred by circuitry, unless the statute could be construed to preclude impliedly the action of deceit on the ground that otherwise the statute would be to a great extent nullified.¹⁰

⁴ Employers can readily adapt themselves to such a rule by requiring proof and refusing doubtful cases.

⁵ Cf. *McCutcheon v. The People*, 69 Ill. 601. *Tatum v. The State*, 63 Ala. 151, may be distinguished because in that case the statute punished for selling liquor to persons of known intemperate habits. The interest of society in the result of a civil suit influenced the decisions in the following cases. See *Monteith v. Kokomo Wood Enameling Co.*, 159 Ind. 149, 154, 64 N. E. 610, 611; *Inland Steel Co. v. Yedinak*, 172 Ind. 423, 438, 87 N. E. 229, 236; *American Car Co. v. Armentraut*, 214 Ill. 509, 514, 73 N. E. 766, 768.

⁶ See 2 AMES & SMITH, CASES ON TORTS, 242, n. 1; 25 HARV. L. REV. 463.

⁷ *American Car Co. v. Armentraut*, *supra*; *Inland Steel Co. v. Yedinak*, *supra*; *Lenahan v. Pittston Coal Co.*, *supra*. *Contra*, *Berdos v. Tremont & Suffolk Mills*, 209 Mass. 489, 95 N. E. 876; *Rolin v. Reynold's Tobacco Co.*, *supra*.

⁸ *Berdos v. Tremont & Suffolk Mills*, *supra*. Cf. *Regina v. Tyrrell* (1894), 1 Q. B. 710; *Commonwealth v. Willard*, 22 Pick. (Mass.) 476.

⁹ The only doubt is whether the deceit would be considered legal cause of the damage suffered by the employer, since it merely led him to put himself into a situation where he would be liable if an accident occurred. But where there is moral obliquity, more remote causes will be deemed legal cause. 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 111. The conclusion that deceit is legal cause would, therefore, follow *a fortiori* from such a case as *Fine v. Interurban Ry. Co.*, 45 N. Y. Misc. 587, 91 N. Y. Supp. 43.

¹⁰ The reasoning of the cases in accord with the Alabama case indicates a leaning toward such a result, but no mention is made of circuitry. *Braasch v. Michigan Stove Co.*, 153 Mich. 652, 118 N. W. 366; *American Car Co. v. Armentraut*, *supra*; *Inland Steel Co. v. Yedinak*, *supra*. The theory on which some courts refuse to allow recovery for deceit against an infant, who misrepresents his age in order to secure a contract, is somewhat analogous. WILLISTON, WALD'S POLLOCK ON CONTRACTS, 82, n. 26, 27.

Although the legislature's purpose may be examined to determine the character of a cause of action expressly created, yet a wholly dissimilar common-law cause of action can scarcely be destroyed by any construction of the statute.¹¹ To protect fully the interests of society, a statute providing against this difficulty should be passed.

THE RULE AGAINST PERPETUITIES AND POWERS. — The writer of a note in the Law Quarterly Review for January¹ on the case of *In re de Sommers*² seems to have imagined that Parker, J., made a serious mistake in stating that a special power so limited that it may be exercised at a time beyond lives in being and twenty-one years afterwards is absolutely void. The rule is stated in substantially these words by Mr. Gray³ and Mr. Marsden.⁴ The language of the learned judge was "A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being and twenty-one years afterwards, is, by reason of the rule against perpetuities, absolutely void; but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule." The writer of the note sets out the first part of this sentence, down to the semicolon, and then quotes from the judgment of Lord Cairns in *Slark v. Dakyns*,⁵ where, in speaking of a power given to a daughter, he says, "It does not follow that because the original power might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void," which is exactly what Parker, J., says in the last part of the same sentence. The note also refers to Lord St. Leonards, and says that "he too thought that a power was not invalid if it could be exercised, although not necessarily so, within the limits of the rule against perpetuities." But Lord St. Leonards does not use language of this kind at the pages referred to,⁶ and he only says that a power may be given to a person *in esse* to appoint to grandchildren or remoter issue, and, if he only appoint to such as are living at his death, it will be good. Lord St. Leonards, like Lord Cairns, is speaking of a power given to a living person, which, as Parker, J., says, "must, of course, if exercised at all, be executed during his life, and is therefore valid." The statements of both of them go only to the point that the power is not bad merely because its terms would permit an appointment to objects that are too remote, which is now a familiar rule.⁷

¹¹ If, instead of looking at the statute for express authority, a court proceeded on the theory that it was in substance carrying out at common law a policy declared by the legislature, the question would be more open to doubt. But even then, it is submitted, the abolishing of a common-law cause of action in a particular circumstance is a type of judicial legislation not warranted by authority. See 26 HARV. L. REV. 531.

¹ 29 LAW QUARTERLY REVIEW, 13.

² [1912] 2 CH. 622.

³ GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 473, 475.

⁴ MARSDEN, PERPETUITIES, 239.

⁵ L. R. 10 CH. 39.

⁶ SUGDEN, POWERS, 8 ed., 152, 397.

⁷ GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 473, 510; MARSDEN, PERPETUITIES, 236.

It might almost be supposed from what is said in the note in speaking of a power which can be "exercised, although not necessarily so, within the limits of the rule against perpetuities," or which "can only be exercised outside the limits," that the writer is referring to the manner in which a power may be exercised, and not to the time within which by its terms it may be exercised. But if he referred to the manner of its exercise, he would only be saying what is more clearly said by Parker, J., that, if the power can only be exercised within the legal period, it is good, although a particular exercise of it might be void. The writer of the note does not expressly deny the existence of the rule that a power is void unless it is in some way limited so that it must be exercised, if at all, within the period allowed for future limitations to take effect. He says that, "if the power can only be exercised outside the limits, it is invalid," and refers to *Floyer v. Bankes*⁸ and *Goodier v. Edmunds*,⁹ but these cases decided that a power that might by its terms be exercised at a time beyond the limits was void. The latter case was decided in accordance with a *dictum* of Jessel, M. R., regarding the same will in *Goodier v. Johnson*,¹⁰ namely, "It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after." He might also have cited the cases of *Wollaston v. King*¹¹ and *Morgan v. Gronow*,¹² in which testamentary powers of appointment were given to persons not *in esse* at the date of the settlement under which the powers were created, and they were held to be void because they might be exercised at a time beyond the legal limit. In neither of these cases was there any question as to the time when the power was actually exercised, or the manner in which it was exercised, and in the latter case the power would have been valid if it had in terms been limited to the time when it was in fact exercised, for the will of the daughter, to whom it was given, took effect in the lifetime of her father who was living at the date of the settlement. The statement in the note that "the pronouncement of Parker, J., also seems inconsistent with the decisions" in *Briggs v. Oxford*¹³ and *In re Stamford*¹⁴ is surprising, for it overlooks the circumstance that in those cases the powers were subsequent to estates tail, and were held to be valid on the ground that the tenant in tail, by barring the entail, would bar also the power, according to the well-known rule.¹⁵

The facts in the case of *In re de Sommers* were very simple. The testator directed the trustees for the time being of his will to hold part of his estate "upon trust to pay the capital or income thereof, or neither, to my nephew the said Eugene de Sommers, or to apply the capital or income thereof, or any part of either for his benefit, or for the benefit of his wife or any child or children of his," according to their discretion, and there was no other limit to the duration of the trust. Parker, J., held that the powers of the trustees were not limited to the lives of the living trustees, as they were vested in the trustees for the time being, and, as regards the nephew's children, might be exercised during the life of

⁸ L. R. 8 Eq. 115.

¹⁰ 18 Ch. D. 446, 447.

¹² L. R. 16 Eq. 1, 10.

¹⁴ [1912] 1 Ch. 343.

¹⁵ GRAY, RULE AGAINST PERPETUITIES, 2 ed., § 490; MARSDEN, PERPETUITIES, 243.

⁹ [1893] 3 Ch. 455.

¹¹ L. R. 8 Eq. 165, 169, 170.

¹³ 1 DeG., M. & G. 363.

any afterborn child and would therefore be void, if there were only a single power. But he came to the conclusion that there were two powers, one to pay to the nephew, which was necessarily confined to his life and consequently valid, the other to apply for the benefit of him or his wife or children, which might be exercised at a time too remote and was therefore void.

J. L. T.

RECENT CASES.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — PARTIES TO WRITINGS: PAROL EVIDENCE TO EXONERATE AGENT. — The plaintiff and the defendant entered into a written contract with the oral understanding that the contract was between the plaintiff and the defendant's principal. *Held*, that parol evidence is not admissible to exonerate the defendant. *Gordon Malting Co. v. Bartels Brewing Co.*, 206 N. Y. 528, 100 N. E. 457.

When the parties to a contract have embodied the terms in a written agreement, parol evidence is in general inadmissible to show that the actual agreement was otherwise. *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233. See 4 WIGMORE, EVIDENCE, § 2425. Under the facts of the principal case, therefore, the agent cannot show that he was to be free from personal liability. *Nash v. Towne*, 5 Wall. (U. S.) 689; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53. See *Higgins v. Senior*, 8 M. & W. 834, 844. If there is any ambiguity on the face of the instrument as to the rôle in which the agent acts, it is explainable. *Kean v. Davis*, 21 N. J. L. 683; *Armstrong v. Andrews*, 109 Mich. 537, 67 N. W. 567. And if agents in signing their own names carried the fiction of agency so far as actually to denote their principals thereby, the evidence might be admissible to construe the meaning of the signature. *Cf. Myers v. Sarl*, 3 El. & El. 306. But it would not seem that agents do so use their names. Force is lent to the suggestion, however, by the admission of evidence to charge the principal under the same facts. *Calder v. Dobell*, L. R. 6 C. P. 486; *Lerned v. Johns*, 91 Mass. 419. *Contra, Chandler v. Coe*, 54 N. H. 561. But evidence of collateral agreements is admissible if the written document is one which might naturally not include that agreement and was not so intended. If the parties intended a double liability, they might be likely not to seek to bind both principal and agent on the same document. Evidence that the principal was also to be bound on the contract can be properly admissible only on this ground.

AGENCY — PRINCIPAL'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR — LIABILITY FOR NEGLIGENT BLASTING. — An independent contractor was engaged in blasting on the defendant's land. Due to his negligence rocks were hurled upon the plaintiff's land. *Held*, that the plaintiff may recover from the landowner. *Hounscome v. Vancouver Power Co.*, 23 West. L. Rep. 167. (Brit. Col., Ct. App.)

Under the English rule of absolute liability for injury caused by the escape of anything brought onto his land, an owner is liable even though the escape was caused by the act of an independent contractor. *Rylands v. Fletcher*, L. R. 3 H. L. 330. Such a broad rule would cover this case. But in many jurisdictions in this country this absolute liability is not recognized. *Marshall v. Wellwood*, 38 N. J. L. 339; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178. When, indeed, the act of the contractor is such that the injury flows directly and necessarily from this act, the owner is liable in trespass, without regard to negligence. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853. But otherwise, by the weight of authority, and

rightly it seems, it is not the trespass of the owner and he is not liable. *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197; *Tibbets v. Knox & Lincoln R. Co.*, 62 Me. 437. The same reasoning applies where the owner is sought to be held for damage from a nuisance created by the contractor. *Allanta & F. R. Co. v. Kimberly*, 87 Ga. 161, 13 S. E. 277; *Bailey v. Troy & Boston R. Co.*, 57 Vt. 252. See *Jones v. McMinimy*, 93 Ky. 471, 473, 20 S. W. 435. It might seem reasonable to hold a landowner to the use of due care in the management of his property and require him to answer for the negligence of any to whom he might entrust the performance of that duty. Such a view, however, has not in general found favor with the courts. *Berg v. Parsons*, 156 N. Y. 109, 50 N. E. 957; *Blumb v. City of Kansas*, 84 Mo. 112. But in a narrower class of cases, where the work is commonly said to be inherently dangerous, this principle has been generally accepted. *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 Atl. 32; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894; *Davis v. Summerfield*, 133 N. C. 325, 45 S. E. 654. *Contra*, *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, *supra*. It is said in these cases that the owner must use care to prevent the probable consequences of dangerous acts, but it amounts in substance to a liability for the contractor's negligent performance of the duty delegated to him. Such a rule has convincing arguments of policy to commend it; it would explain the blasting cases, and sufficiently protect neighboring owners from dangerous undertakings.

BAILMENTS — BAILOR AND BAILEE — WHAT CONSTITUTES CONTRACT LIMITING LIABILITY. — The plaintiff checked a package in the defendant's parcel room. On the back of the claim check was a notice, unseen by the plaintiff, limiting the defendant's liability to ten dollars. The parcel was negligently misdelivered by the defendant's servant. *Held*, that the plaintiff can recover full damages. *Healy v. New York Central & Hudson River R. Co.*, 153 N. Y. App. Div. 516.

While a bailee can limit his liability by contract, there are several views as to when this limitation becomes a term of the contract. In England, at common law, any notice to the bailor was held to be embodied in the agreement. *Wyld v. Pickford*, 8 M. & W. 443. In the United States mere notice has not this effect. *Judson v. Western R. Co.*, 6 Allen (Mass.) 486. Some courts hold the bailor bound contractually only by such limitations as he actually consents to. *Chicago & Northwestern Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. But by the weight of authority if the bailee's receipt is of such a nature that it is generally known to embody the terms of the contract, the bailor is presumed to know and assent to these terms. *Taussig v. Bode*, 134 Cal. 260, 66 Pac. 259; *Durgin v. American Express Co.*, 66 N. H. 277, 20 Atl. 328. Some courts intimate that this presumption can be rebutted. *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212. See *Boorman v. American Express Co.*, 21 Wis. 152, 158. A person signing an unread contract is conclusively bound by its terms. *Fivey v. Pennsylvania R. Co.*, 67 N. J. L. 627, 52 Atl. 472. It would seem by analogy, therefore, that merely accepting a receipt of a kind generally known to contain the terms of the contract of bailment, should bind the bailor to these terms. *Taussig v. Bode*, *supra*. As a parcel-room check hardly falls within this description, the limitation on the back should not be a term of the bailment. *Cf. Blosson v. Dodd*, 43 N. Y. 264.

BILLS AND NOTES — DOCTRINE OF PRICE v. NEAL. — A testatrix had given money to her agent in trust to terminate a city assessment lien against property devised by her to the defendant. An employee of the agent misappropriated a check given him to carry out the direction of the testatrix, and later forged a check on the plaintiff bank payable to the city collector, with which the assessments were paid and the lien discharged. Upon discovering the forgery, the

bank claimed reimbursement from the defendant who had sold the property unencumbered. *Held*, that the bank is not entitled to relief. *Title Guarantee & Trust Co. v. Haven*, 139 N. Y. Supp. 207 (Sup. Ct., App. Div.). See NOTES, p. 634.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — KNOWLEDGE OF A CORPORATION AS NOTICE TO ITS OFFICERS. — The plaintiff, who held the position of president in a bank, but took no active part in its affairs, bought of the bank without actual notice of any defect a promissory note given to the bank by the maker without consideration. *Held*, that the plaintiff is not a holder in due course. *McCarty v. Kepreia*, 139 N. W. 992 (N. D.).

Actual knowledge is necessary to constitute notice under § 56 of the Negotiable Instruments Law, but this section must be construed in the light of the common-law principles of which it is declaratory. *Cf. Schlesinger v. Lehmaier*, 191 N. Y. 69, 83 N. E. 657. On principles of agency the knowledge of an officer or agent of a corporation, as to a transaction carried out by him in the scope of his employment, is the knowledge of the corporation for the purpose of charging it with liability. *National Security Bank v. Cushman*, 121 Mass. 490; *Twenty-Sixth Ward Bank v. Stearns*, 148 N. Y. 515, 42 N. E. 1050. Nor can a corporation do acts through ignorant agents and escape the consequence of its own knowledge. *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. (U. S.) 299; *Curtime v. Crawford County Bank*, 118 Fed. 390. But no principle of agency can impute to the agent the knowledge of his principal and make him personally responsible for it. The officers have perhaps a duty to be conversant with the corporation affairs; but it seems unjust that an officer, who gratuitously furnishes his name, aid, and valuable advice should be compelled to follow the corporate business in detail, or that the law should do more than create a presumption that he is conversant with it. *Proctor v. Baldwin*, 82 Ind. 370; *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. *Contra, Merchants' Bank v. Rudolph*, 5 Neb. 527. See *Gillet v. Phillips*, 13 N. Y. 114, 117. Further, mere negligence in not knowing will not affect a purchaser of a negotiable instrument with notice. *American National Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99. It is submitted, therefore, that the decision in the principal case is incorrect.

BILLS AND NOTES — PURCHASERS FOR VALUE WITHOUT NOTICE — PAYEE AS PURCHASER FOR VALUE UNDER THE NEGOTIABLE INSTRUMENTS LAW. — The defendant was induced by fraud of the maker to sign promissory notes as surety. The maker then delivered the notes to the payee, who paid value without notice of the fraud. Under section 52 of the Negotiable Instruments Law one of the requisites of a holder in due course is "that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 30 provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." *Held*, that the payee cannot be a holder in due course. *Stone v. Goldberg & Lewis*, 60 So. 744 (Ala.).

The principal case seems correct in holding that by a fair construction of section 52 an instrument must be negotiated to the transferee in order to render him a holder in due course. But see *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646. The further question arises whether transferring a note to the payee is a negotiation within section 30. Under section 20 of the English Bills of Exchange Act and section 14 of the Negotiable Instruments Law, both providing expressly that under certain circumstances an instrument must be negotiated to a holder in due course in order to render the maker liable,

it has been held that a transfer to the payee will not be such a negotiation. *Herdman v. Wheeler*, [1902] 1 K. B. 361; *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 112 N. W. 807. But see *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794, 808. It has been held, however, that irrespective of such provisions the payee can recover on the ground of estoppel. *Lloyd's Bank v. Cooke*, *supra*. At common law the payee could be a holder in due course. *Watson v. Russell*, 3 B. & S. 34; *Fairbanks v. Snow*, 145 Mass. 153. *Contra*, *Charlton Plow Co. v. Davidson*, 16 Neb. 374. Since a *bonâ fide* payee is in substantially the same position as a *bonâ fide* indorsee, the common-law rule seems correct, and it would seem desirable to extend section 30 so as to expressly include a transfer to the payee. Under the present wording of the statute a result opposed to that of the principal case can only be reached by a strained construction of the word "negotiation" or the questionable theory of an estoppel.

CARRIERS — CONNECTING LINES — INITIAL CARRIER: PRESUMPTION AS TO LOSS OF GOODS. — The plaintiff consigned goods on a through shipment over connecting lines. A part of the goods was lost. There was no evidence that the loss occurred on the defendant line, the initial carrier, nor did it contract to assume liability for the whole carriage. *Held*, that the defendant is not liable for the loss. *St. Louis, Iron Mountain, & Southern Ry. Co. v. Carlile*, 128 Pac. 690 (Okla.).

If the initial carrier assumes liability for the delivery of goods at their destination it is liable for any loss occurring during the carriage. *Adams Express Co. v. Wilson*, 81 Ill. 339. *Cf.* *Beard v. St. Louis, A. & T. H. Ry. Co.*, 79 Ia. 527, 44 N. W. 803. Courts differ, however, as what constitutes assumption of such liability. By the English rule the mere receiving of goods addressed to a point beyond its own line makes the initial carrier liable. *Muschamp v. Lancaster & P. J. Ry. Co.*, 8 M. & W. 421. This rule is generally said not to obtain in the United States. See *Myrick v. Michigan Central R. Co.*, 107 U. S. 102, 106, 1 Sup. Ct. 425, 429; *Bishawaiti v. Pennsylvania R. Co.*, 92 N. Y. Supp. 783. It has, however, been adopted by a number of jurisdictions. *Allen & Gilbert-Ramaker Co. v. Canadian Pacific Ry. Co.*, 42 Wash. 64, 84 Pac. 620; *Chicago & Northwestern Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596. A few cases have been found holding directly contrary to the English rule. *Northern R. Co. v. Fitchburg R. Co.*, 6 Allen (Mass.) 254; *The Thomas McManus*, 24 Fed. 509. But most of the cases cited as holding contrary to the English rule are distinguishable on the grounds of express limitation of liability to the initial carrier's own line, lack of authority by the agents to make through contracts, or express statutory provision. *Myrick v. Michigan Central R. Co.* *supra*; *Roy v. Chesapeake & Ohio Ry. Co.*, 61 W. Va. 616, 57 S. E. 39; *Atchison, T. & S. F. Ry. Co. v. Rutherford*, 29 Okla. 850, 120 Pac. 266. If, as in the principal case, the evidence fails to locate the loss, there is no presumption that it occurred on the initial carrier's line. *Atchison, T. & S. F. Ry. v. Rutherford*, *supra*. But see *Brintnall v. Saratoga & Whitehall R. Co.*, 32 Vt. 665, 675. There is, however, a presumption that it occurred on the final carrier's line. *Faison v. Alabama & Vicksburg Ry. Co.*, 69 Miss. 569, 13 So. 37; *St. Louis Southwestern Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835. But if, as seems probable, this presumption exists because the evidence of the place of loss is ascertainable solely by the carrier, there is no reason, it is submitted, why it should not be raised against whatever carrier may be defendant in the suit.

CARRIERS — CONNECTING LINES — LIABILITY OF CONNECTING CARRIER ON CONTRACT MADE BY INITIAL CARRIER. — The consignor of goods sent by the Wells Fargo and the defendant express companies arranged with the former company for payment of express. The defendant was not notified of the contract and refused to deliver to the consignee until paid full charges. *Held*,

that the defendant company is liable to the consignee for this refusal. *Alcorn v. Adams Express Co.*, 45 Chi. Leg. News 151 (Ky.).

There are several theories as to the relation of parties concerned in a shipment over connecting lines. One view is that in the absence of a contrary agreement the connecting carrier is the agent of the initial carrier. *Scothorn v. South Staffordshire Ry. Co.*, 8 Exch. 341. Under this view, because of the doctrine of *respondeat superior* the initial carrier is clearly under liability for the entire shipment, and the connecting carrier, it is submitted, would be liable only for negligence. It has also been held that *prima facie* the initial carrier is the forwarding agent of the shipper, and that the shipper has only such rights as his agent secures him. *Patten v. Union Pacific Ry. Co.*, 29 Fed. 590. This seems the proper theory when there is no traffic agreement for through shipments. The principal case follows a third view, that the initial carrier is the agent of the connecting carrier, and that, therefore, the duties of the connecting carrier are determined by the agreement made between the initial carrier and the shipper. *Pittsburg, C. & St. L. Ry. Co. v. Viers*, 113 Ky. 526, 68 S. W. 469; *Maghee v. Camden & Amboy R. Transportation Co.*, 45 N. Y. 514. This reasoning is correct only if there is a traffic agreement authorizing the initial carrier to contract for through shipments. *Houston & T. C. R. Co. v. Everett*, 99 Tex. 269, 89 S. W. 761; *Church v. Atchison, T. & S. F. Ry. Co.*, 1 Okla. 44, 29 Pac. 530. Otherwise the connecting carrier can clearly refuse goods not offered on terms it could demand of a shipper. *Southern Indiana Express Co. v. United States Express Co.*, 88 Fed. 659, aff'd in 92 Fed. 1022. It is submitted, therefore, that the court erred in not requiring proof of such an agreement creating an agency.

CIVIL LAW — RECOGNITION OF ARTIST'S RIGHTS IN PICTURE NOW OWNED BY ANOTHER. — A lady who owned a private residence in Berlin, of which she occupied the upper floor while the lower floor was let to a tenant, desired to have the vestibule of the house decorated by a fresco painting and engaged a well-known artist to do the work. The painting when finished represented an island with some nude figures of sirens. To these nudes the lady who had ordered the painting took exception, and she had another artist over-paint the figures so that they appeared as draped. The first artist contended that this change violated rights which as an artist he had in the integrity of his work, and although the owner covered the altered portion of the fresco by a curtain, he was not satisfied, but brought an action demanding the restoration of the painting to its original condition, or failing in that demand, its entire withdrawal from where it might be visible to strangers. The lower court granted the latter prayers, and the plaintiff appealed. Held, that the overpainted drapery must be removed. 79 Entscheidungen des Reichsgerichts 397 (German Imperial Court, 1912).

The holding in this case marks an advance in the law of Germany which has produced considerable interest and discussion in that country. It is noteworthy that although the German law is codified there is no explicit provision of the written law applicable to this controversy. Although it is unlikely that the result could be reached in common-law countries, it is illustrative of the present wide-spread tendency to extend the protection of the law to personal interests of an indefinite character. The court said that the principle of the decision must be deduced from the relative rights of the owner, of the public, of the artist to his reputation, and perhaps from a right of personality, which, even if not recognized as a distinct generic right, may yet be enforced with regard to particular interests. The artist has a legitimate interest that his work shall not be presented to the world otherwise than in the form in which it represents his artistic individuality. If possible this interest should be protected by the law. The difficulty lies in reconciling this right with the right of the owner where, in exceptional cases like the present, a conflict arises between the two.

The owner may remove the painting from public view; he may probably even destroy it; with such possibilities the artist must reckon when he sells his work; but not with the possibility of having the individuality and integrity of his painting violated while leaving it to exist as a work of art which may at some time be viewed and criticized by strangers, even if for the present it is shielded from indiscriminate gaze.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — PIPE-LINE AMENDMENT TO INTERSTATE COMMERCE ACT. — By an amendment to the Interstate Commerce Act adopted in 1906, Congress provided that all pipe-lines engaged in the interstate transportation of oil should be held common carriers. The act was construed to apply to all pipe-lines irrespective of whether or not they had professed to carry for the public. *Held*, that the act, so construed, is unconstitutional. *Prairie Oil and Gas Co. v. United States*, U. S. Commerce Ct., March 11, 1913. See NOTES, p. 631.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — MARTIAL LAW. — The governor of a state with the authority of the legislature, proclaimed martial law in a certain district. The relator was arrested, tried, and sentenced to prison by the military authorities, for an offense committed prior to the governor's proclamation. The state constitution expressly provided that the writ of *habeas corpus* should not be suspended, and that no one should be tried for a civil offense by a military commission. *Habeas corpus* proceedings were instituted in the relator's behalf. *Held*, that necessity justified the imprisonment, at least while the disturbance continued, and that the writ be refused. *State ex rel. Mays v. Brown*, 77 S. E. 243 (W. Va.). See NOTES, p. 636.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — OBLIGATION OF COURTS TO GIVE ADVISORY OPINIONS. — Under a constitutional provision that "the Supreme Court shall give its opinion upon important questions upon solemn occasions when required by the Governor," the latter put certain interrogatories. The court declined to answer on the ground that the occasion was not in their judgment sufficiently solemn to require it. *In re Lieutenant Governorship*, 129 Pac. 811 (Colo., Sup. Ct.).

Advisory opinions are purely extra-judicial, and are not binding either as decisions or as precedents. See *Opinion of Justices*, 126 Mass. 557, 566; *Opinion of Court*, 60 N. H. 585. But see *Answer of Justices*, 70 Me. 570, 583; *In re Senate Resolution*, 12 Colo. 466, 467, 21 Pac. 478, 479. They are given without a hearing of interested parties or assistance of counsel, and oftentimes with but an imperfect knowledge of the facts. These considerations, together with a feeling of jealousy for the independence of the judiciary, have often caused the judges, in the few states which have similar constitutional provisions, to be reluctant to give such opinions. See *Opinion of Justices*, 5 Metc. (Mass.) 596, 597; *Opinion of Justices*, 9 Cush. (Mass.) 604. Several courts have declined to answer, as in the principal case, affirming their right to decide whether the question was important or the occasion solemn. *Answer of the Justices*, 148 Mass. 623, 21 N. E. 439; *Answers of Justices*, 95 Me. 564, 51 Atl. 224. These provisions were, however, intended to constitute the judges the legal advisers of the other departments, after the English practice of the king and the House of Lords calling on the judges. See *Opinion of the Justices*, 126 Mass. 557, 561. It is hardly an effective adviser who must answer only when he thinks the questioner needs it. In the nature of things, it seems more reasonable to lodge the power to determine the necessity for advice in the party asking it. The wonted interpretation of such provisions is perhaps influenced by a feeling of their un wisdom and the consequent desirability of restricting the right. See 24 AM. L. REV. 369.

CORPORATIONS — STOCKHOLDERS — RIGHT OF PREFERRED STOCKHOLDERS TO SHARE IN STOCK DIVIDENDS. — A corporation declared a stock dividend to common stockholders only. It represented a distribution of accumulated earnings after payment of the preferred dividend at the rate fixed by the charter. The plaintiff, a preferred stockholder, brought suit to share in the dividend. *Held*, that the plaintiff cannot recover. *Niles, Admr. v. Ludlow Valve Mfg. Co.*, 46 Nat. Corp. Rep. 51 (C. C. A., 2d Circ.).

The common stockholders would undoubtedly be entitled to the surplus earnings if distributed as cash. But a preferred stockholder has none the less a right to insist that his proportionate share in the control of the corporation and the assets of the enterprise be preserved. He should therefore be allowed his *prorata* share of any new issue of stock. *Cf. Gordon's Exrs. v. Richmond, F. & P. R. Co.*; 78 Va. 501; *Jones v. Concord & Montreal R. Co.*, 67 N. H. 119, 38 Atl. 120. See 26 HARV. L. REV. 75.

EVIDENCE — OPINION EVIDENCE — EXPERT TESTIMONY: LEARNED TREATISES. — In an action for personal injuries a medical treatise was offered as evidence of the opinion therein expressed. *Held*, that such evidence is inadmissible. *Denver City Tramway Co. v. Gawley*, 129 Pac. 258 (Colo.). See NOTES, p. 642.

EVIDENCE — SIMILAR FACTS AND OCCURRENCES — CRIMES SIMILAR TO ONE IN ISSUE. — The defendant induced the prosecuting witness to join with him in the purchase of a business. While the arrangements were being made, unknown men entered the room, alleged that they were detectives, accused the defendant of having counterfeit money, mixed the money of the plaintiff and defendant, and disappeared with it. On a prosecution for conspiracy to steal, another man was allowed to testify, to show the intent and design of the defendant, that three months after this transaction he had lost his money in a similar way while dealing with the defendant. *Held*, that this evidence was improperly admitted. *Efler v. State*, 85 Atl. 731 (Del., Super. Ct.).

Considerations of policy render inadmissible evidence of other crimes when relevant only to show the defendant's bad character. *Ware v. State*, 91 Ark. 555, 121 S. W. 927. But such evidence is admissible when relevant for other purposes. See *Commonwealth v. Robinson*, 146 Mass. 571, 577, 16 N. E. 452, 454. One view makes the test of admissibility whether the evidence offered is probative of certain enumerated matters connected with the crime, such as intent, identity, and design. *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286; *Schultz v. United States*, 200 Fed. 234. In such cases admission is considered an exception to the general excluding rule. See *Commonwealth v. Jackson*, 132 Mass. 16, 18. The other view requires only that the evidence be materially relevant to establish the crime charged, other than by showing the defendant's bad character. *Rex v. Ball*, [1911] A. C. 47. See *People v. Molineux*, 168 N. Y. 264, 343. This view seems more just and logical and less artificial. Some courts in adhering to the narrower view have rejected evidence of great probative value. *Marshall v. United States*, 197 Fed. 511; *State v. Jeffries*, 117 N. C. 727, 23 S. E. 163. Ultimately, indeed, the two theories may achieve substantially similar results, for the tendency of the courts adopting the restrictive view is to increase the number of exceptions. See UNDERHILL, CRIMINAL EVIDENCE, § 87. In the principal case, on account of the similar peculiarities of the two crimes, the evidence had considerable probative value, and under either theory it would seem to be relevant to show that the acts of the alleged detectives and the defendant were done in pursuance of a plan which the defendant aided in performing, and that the defendant did not act innocently. *People v. Weil*, 244 Ill. 176, 91 N. E. 112; *Commonwealth v. Pugliese*, 44 Pa. Super. Ct. 361; *State v. Craddock*, 61 Wash. 425, 112 Pac. 491.

FIXTURES — REMOVAL: EFFECT OF AGREEMENT TO TREAT FIXTURES AS PERSONALTY. — A landowner allowed the plaintiff to erect billboards with the privilege of removing them at any time. A *bonâ fide* purchaser of the land refused to allow removal and the plaintiff sued for conversion of the billboards. *Held*, that the plaintiff cannot recover. *Cochrane v. McDermott Advertising Agency*, 60 So. 421 (Ala.).

Where the landowner consents that a stranger annex a fixture to his land and retain the right to sever, various views have been taken. It is often said, as in the principal case, that because of the agreement the fixture remains a chattel to which the stranger has title. *Ham v. Kendall*, 111 Mass. 297. It is thus sometimes held that if the stranger is a mortgagee and has recorded a chattel mortgage he prevails over a *bonâ fide* purchaser of the land. *Ford v. Cobb*, 20 N. Y. 344. *Cf. Sowden v. Craig*, 26 Ia. 156, 165. But the protection of the stranger is qualified in the principal case by holding that the agreement being merely a personal one is not effective against *bonâ fide* purchasers of the land. *Wickes Bros. v. Hill*, 115 Mich. 333, 73 N. W. 375; *Thompson v. Smith*, 111 Ia. 718, 83 N. W. 789. This result seems just, and it would seem equally just even where a chattel mortgage is recorded, since one who buys what is at least an apparent part of realty cannot be expected to search the records of personal property. See *Bringholff v. Mungurmaier*, 20 Ia. 513, 519; *Tibbets v. Home*, 65 N. H. 242, 247. The ground for such a result might perhaps be estoppel, although it is difficult to see why, if fixtures may be either realty or personalty, there is any representation by their mere affixing that they are realty. But it would seem that the court is stating in fictitious terms that the stranger in substance retained only an equitable interest in the billboards. If this is true, the court is in accord with a view often taken that the right to sever is a contract right specifically enforceable in equity against all having notice of it. *St. Louis & San Francisco R. Co. v. Beadle*, 50 Pac. 988 (Kan. App.). *Cf. Landon v. Platt*, 34 Conn. 517, 523. This result seems to indicate that the fixture is realty, but that the stranger retains the equitable interest in that section of the realty.

INFANTS — UNBORN CHILDREN — INJURIES BY CARRIER. — The plaintiff's mother, while a passenger on the railroad of the defendant company, was negligently injured by it, and as a result the plaintiff, who was at the time *en ventre sa mère*, was born in a deformed condition. The railroad company was not aware of the pregnancy of the plaintiff's mother. *Held*, that though a child may sue for wrongful injuries to him before his birth, this plaintiff cannot recover because he was not a passenger. *Nugent v. Brooklyn Heights R. Co.*, 139 N. Y. Supp. 367 (Sup. Ct. App. Div.). See NOTES, p. 638.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — WHITE SLAVE ACT. — The defendant was convicted under a federal statute which made criminal the assisting in the transportation of women in interstate commerce for the purpose of prostitution. *Held*, that the statute is constitutional. *Hoke v. United States*, 227 U. S. 308.

The power of Congress to prevent the use of interstate commerce for the purpose of furthering immoral practices or distributing objectionable commodities would seem to have been fairly well established by previous cases. *Lottery Case*, 188 U. S. 321, 23 Sup. Ct. 321; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364. This decision settles the question beyond the possibility of doubt. The result reached seems a desirable one since the commerce clause has to a large extent deprived the states of the power to protect the public health and morals by commercial regulations. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681. If Congress did not possess this power, the result of the commerce clause would be to deprive society of an effective means of self-protection.

INTERSTATE COMMERCE — CONTROL BY STATES — TAXATION: GOODS IN TRANSIT. — The defendant shipped grain from western to eastern points under through bills of lading which allowed warehousing in Chicago for inspection and testing. Illinois taxed the grain in warehouse as his personal property. *Held*, that the tax is constitutional. *Bacon v. People of Illinois*, 227 U. S. 504, 33 Sup. Ct. 299.

This decision seems to show that in taxation, at least, the question of interstate commerce is to be approached from the viewpoint of a reserved power in the states, and that a property tax is constitutional if not levied on the commerce as such and if it does not discriminate against interstate commerce. See 26 HARV. L. REV. 358.

JOINT WRONGDOERS — EFFECT OF RELEASE OF ONE NOT LIABLE FOR THE TORT. — In an action for the death of the plaintiff's intestate due to the defective condition of a sidewalk, for which the defendant was responsible, it appeared that the plaintiff had for consideration released the city from all liability for the injury. The city was not legally liable. *Held*, that this release is a bar to the present action. *Casey v. Auburn Telephone Co.*, 139 N. Y. Supp. 79 (Sup. Ct., App. Div.).

A release under seal at common law, given to one joint wrongdoer, discharges the liability of all, on the ground that each is liable in full and one release is equivalent to actual satisfaction. *Bronson v. Fitzhugh*, 1 Hill (N. Y.) 185; *Stone v. Dickinson*, 89 Mass. 26. Where there is no formal release it becomes a question of fact whether the amount is paid by one wrongdoer as satisfaction in full. *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271. If not a complete satisfaction the amount paid is only a *pro tanto* bar to a suit against a joint wrongdoer. *Lovejoy v. Munsy*, 3 Wall. (U. S.) 1; *Ellis v. Esson*, 50 Wis. 138. Where settlement in full is made with one not actually liable, those liable in fact are discharged. *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45; *Hartigan v. Dickson*, 81 Minn. 284, 83 N. W. 1091. *Contra*, *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548. And therefore it is urged that a mere release under seal will have the same effect. *Hubbard v. St. Louis & M. R. Co.*, 173 Mo. 249, 72 S. W. 1073. *Contra*, *Thomas v. Central R. of N. J.*, 194 Pa. St. 511, 45 Atl. 344. It is submitted, however, that a new release of one not liable cannot extinguish a liability which attaches only to another. Of course an injured person should receive but one satisfaction, and the question whether the compromise in the principal case is a complete bar should depend on whether it was actually intended as full satisfaction for the injury.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — RECOVERY FOR INJURY TO FEELINGS. — The plaintiff sued the defendants who, in accordance with a prior agreement among themselves, shadowed the plaintiff in such a manner that it was apparent to the public that he was the subject of surveillance. The plaintiff proved that he was thereby caused mental anguish and that his reputation was injured. *Held*, that an actionable tort is proved. *Schultz v. Frankfort Marine, Accident, & Plate Glass Ins. Co.*, 139 N. W. 386 (Wis.).

The court reasons that since when represented by picture shadowing would be actionable, *a fortiori* it must be so when actually committed. But this overlooks the different treatment the law has accorded libel and slander. *Thorley v. Lord Kerry*, 4 Taunt. 355. See ODGERS, LIBEL AND SLANDER, 5 ed., 39. If acts of this character are to be treated as defamation they must be regarded as slander because they are temporary in nature and after the act retain no capacity for republication. See TOWNSHEND, LIBEL AND SLANDER, 4 ed., § 1; BOWER, CODE OF ACTIONABLE DEFAMATION, 20. The technical rules of slander would not allow recovery since from the opinion it would seem that no special

damages were alleged and since shadowing can hardly be said necessarily to impute the commission of a crime involving moral turpitude or ignominious punishment. *Cf. Roberts v. Roberts*, 5 B. & S. 384; *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633. As an action on the case for conspiracy the lack of legal damage in the principal case would prove equally fatal to the plaintiff's recovery. *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Doremus v. Hennessy*, 62 Ill. App. 391. But *cf. Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663. Thus the court treats as actionable acts which result in loss of reputation accompanied by insulting publicity but by no further damage except injury to feelings. Viewed as an action of defamation, the court is abolishing the technical requisites of slander in cases where the injury arises from acts and not from spoken words. The result reached by the Wisconsin court is closely akin to that reached by the courts which, in adopting a right to privacy, extend the protection of the law to similar intangible interests which the common law previously refused to protect.

PARDONS — EFFECT — PARDON AFTER FIRST CONVICTION NOT PREVENTING SUBSEQUENT CONVICTION AS SECOND OFFENDER. — A statute provided that one who was twice convicted of felony should, upon the second conviction, suffer an increased penalty. The defendant received a pardon after his first conviction. He was subsequently convicted of another felony. *Held*, that he must suffer the increased punishment provided by the statute. *People v. Carlesi*, 139 N. Y. Supp. 309 (Sup. Ct., App. Div.). See NOTES, p. 644.

PUBLIC-SERVICE COMPANIES — RIGHTS AND DUTIES — RIGHT TO DISCONTINUE BRANCH OF RAILROAD. — The defendant railroad abandoned part of its line which it claimed was run at a loss. The result was inconvenience to towns on the railroad which were thereby forced to use a much longer route. The railroad commission ordered the defendant to restore adequate service over the line. *Held*, that the order will be enforced. *Colorado & Southern Ry. Co. v. Railroad Commission*, 54 Colo. 64, 129 Pac. 506.

Constitutional liberty as applied to public service is held to mean that as the entrance into a public business is voluntary, so total withdrawal is possible upon reasonable notice. *Satterlee v. Groat*, 1 Wend. (N. Y.) 273. See *Munn v. Illinois*, 94 U. S. 113, 126; 1 WYMAN, PUBLIC SERVICE COMPANIES, § 290. As long as a public-service company retains its charter or franchise mandatory in terms no part of the service may be abandoned. *Chicago & Alton R. Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824; *Savannah & Ogeechee Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 937. When the charter is permissive, according to the weight of authority the company which has accepted a public franchise cannot withdraw even from a separable part of the service. *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 Pac. 719; *State v. Hartford & New Haven R. Co.*, 29 Conn. 538. *Contra, Eastern Ohio Gas Co. v. Akron*, 81 Oh. St. 33, 90 N. E. 40. If the service of the public in general is directly improved by withdrawal, as where a line is changed so as to straighten the line or include a large town, there may be withdrawal. *People v. Rome, Watertown & Ogdensburg R. Co.*, 103 N. Y. 95, 8 N. E. 369. *Cf. Whalen v. Baltimore & Ohio R. Co.*, 108 Md. 11, 69 Atl. 390. It would seem, however, that the liberty to withdraw from public employment entirely necessarily includes abandonment of any separable part. But the fact that the court in the principal case treats the matter rather as a question of reasonable regulation of an existing service indicates that the attempted abandonment was of an integral part. See 1 WYMAN, PUBLIC SERVICE COMPANIES, § 308.

RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — RESTRICTIONS IN PRICE ON RE-SALE. — The plaintiff manufactured chocolate

under a secret unpatented process. The chocolate was sold only under an extensive system of contracts with wholesale and retail dealers whereby the latter bound themselves to maintain the prices set by the plaintiff. The plaintiff sued a retail dealer for violation of a contract made for the benefit of the plaintiff. *Held*, that the system of contracts is not in restraint of trade. *Ghirardelli Co. v. Hunsicker*, 128 Pac. 1041 (Cal.). See NOTES, p. 640.

TORTS—NATURE OF TORT LIABILITY IN GENERAL—LIABILITY FOR BREACH OF CHILD-LABOR STATUTE. — A statute forbade the employment in mines of children under fourteen, but provided no criminal or civil liability. The defendant employed a thirteen-year-old child, who represented himself to be over fourteen. The child was injured, partly from his own negligence, while so employed. *Held*, that the defendant is liable. *De Soto Coal, Mining, and Development Co. v. Hill*, 60 So. 583 (Ala.). See NOTES, p. 646.

TROVER AND CONVERSION — WHAT CONSTITUTES CONVERSION — REPLEDGING BY ORDER OF FRAUDULENT PLEDGOR. — A bailee of certain bonds, who had been given possession by the plaintiff solely for safe-keeping, fraudulently pledged them with the defendant brokers, who had no knowledge of the plaintiff's rights. Later by order of the fraudulent bailee the defendants delivered the bonds to a second brokerage concern to hold in pledge, receiving from them the amount of their own account. *Held*, that the defendant has converted the bonds. *Varney v. Curtis*, 100 N. E. 650 (Mass.).

In general, conversion requires an assertion of dominion over a chattel or an intermeddling with it in a manner inconsistent with the rights of the true owner. *Fouldes v. Willoughby*, 8 M. & W. 540; *Simmons v. Lillystone*, 8 Exch. 431. So an innocent pledgee of goods from a wrongful pledgor is not a converter, for although he holds possession against his pledgor until his debt is paid, he does not necessarily assert dominion against the rightful owner. *Spackman v. Foster*, 11 Q. B. D. 99. Moreover, an innocent redelivery of the pledged article to the wrongful pledgor is not a conversion. *Leonard v. Tidd*, 44 Mass. 6. See *Steele v. Marsicano*, 102 Cal. 666, 669, 36 Pac. 920, 921. The courts reason that since the redelivery restores the *status quo* it has not resulted in any substantial interference with the plaintiff's interest in the property. Hence the principal case turns upon whether the added element of a delivery to a new pledgee makes the first pledgee a converter. True, this was done by the pledgor's orders, but it is well settled that acting for another is no defense in a trover suit. *Stephens v. Elwall*, 4 M. & S. 259. The act of repledging does not return the goods to their original position, and can hardly be performed without assuming the control of an owner over them. Some closely analogous cases have held that an innocent sale or delivery to a third party does not constitute a conversion. *Turner v. Hockey*, 56 L. J. Q. B. 301; *National Mercantile Bank v. Rymill*, 44 L. T. R. N. S. 767. But the weight of authority which is *contra* accords with the principal case. *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; *Hudmon Bros. v. Du Bose*, 85 Ala. 446, 5 So. 162; *Hiort v. Bott*, L. R. 9 Exch. 86.

TRUSTS — CREATION AND VALIDITY — WHETHER CESTUI QUE TRUST CAN CLAIM AFTER HIS DISCLAIMER. — A testatrix left property to trustees in trust to pay the income to the plaintiff for life, then to the plaintiff's son for life; after his death the property was to fall into the residue of the estate. The plaintiff refused to take any interest under the will, whereupon the trustees paid the income to her son. At his death the plaintiff sought to have it paid to her. *Held*, that the income should be paid to the plaintiff during the remainder of her life. *In re Young*, [1913] 1 Ch. 272.

After renunciation of a direct gift, whether this be considered as preventing

title from vesting, or as divesting it, no title exists in the donee. *Matter of Estate of Stone*, 132 Ia. 136, 109 N. W. 455. See *Mallott v. Wilson*, [1903] 2 Ch. 494, 501. A later acceptance, therefore, should not be allowed to revive the gift. This result should likewise follow a disclaimer by a *cestui* of a gift in trust. *White v. White*, 107 Ala. 417, 18 So. 3. See *Libby v. Frost*, 98 Me. 288, 292, 56 Atl. 906, 907. Again, where a legal life estate is disclaimed, the next estates are accelerated. *Adams v. Gillespie*, 2 Jones Eq. (N. C.) 244; *Fox v. Rumery*, 68 Me. 121. Equitable interests are likewise accelerated unless contrary to the intention of the donor. *Randall v. Randall*, 85 Md. 430, 37 Atl. 209; *Hall v. Smith*, 61 N. H. 144. In the principal case, if the son's interest has vested, that of the plaintiff would seem the more clearly to be extinguished. The court's interpretation, that the plaintiff merely assigned her right to her son, seems strained, for the plaintiff's intention in disclaiming was apparently to reject the gift altogether. An interpretation to fit the intention of the party at the time of the act would perhaps have been justifiable. Cf. *Nicloson v. Wordsworth*, 2 Swanst. 365.

TRUSTS — CREATION AND VALIDITY — ORAL TRUST IN LAND ARISING FROM FAMILY SETTLEMENT. — In pursuance of a family settlement six children, of whom the plaintiff was one, conveyed land to the defendant, their mother, upon an oral agreement that she would hold it in trust for them. The defendant later repudiated the agreement. *Held*, that a trust will be impressed on one-sixth of the property in favor of the plaintiff. *Apgar v. Connell*, 48 N. Y. L. J. 2557 (N. Y., Sup. Ct.).

The grantee of land who orally promises to hold it in trust cannot be compelled to carry out the express trust because of the Statute of Frauds, but if he refuses to perform he should be forced, as a constructive trustee, to reconvey; otherwise he is unjustly enriched. See 20 HARV. L. REV. 549, 551. This is the law in England, and in the United States as to trusts for others than the grantor. *Davies v. Otty*, 35 Beav. 208; *McKinney v. Burns*, 31 Ga. 295. In the United States most courts have refused to compel a reconveyance where the oral agreement is to hold in trust for the grantor, arguing that it is a virtual enforcement of the express trust. *Henderson v. Murray*, 108 Minn. 76, 121 N. W. 214. See *Lovett v. Taylor*, 54 N. J. Eq. 311, 317, 34 Atl. 896, 898. But see *Peacock v. Nelson*, 50 Mo. 256, 261. An exception is made, however, where the failure to perform is also a breach of a fiduciary relation between the grantor and the grantee. *Wood v. Rabe*, 96 N. Y. 414. In the principal case this exception has been extended to relations not strictly fiduciary. *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Gallagher v. Gallagher*, 135 N. Y. App. Div. 457, 120 N. Y. Supp. 18. Such an extension to a case which differs from the ordinary one only in the fact that the unjust enrichment is more obvious, makes clear the true ground for the exception. Its arbitrary extension may thus lead at length to a change in the rule.

WATERS AND WATERCOURSES — CONVEYANCES AND CONTRACTS — ASSIGNMENT OF RIPARIAN RIGHTS. — The plaintiffs, owners of river land, sold their entire frontage to the defendant power company, but reserved certain water power to be used upon interior lands. The river becoming low, the plaintiffs filed a bill in equity to enjoin the use by the defendants of any water necessary to supply the power so reserved. *Held*, that the injunction will be denied. *York Haven Water & Power Co. v. York Haven Paper Co.*, 201 Fed. 270.

A right to use the waters of a river may be given by deed by a riparian owner to an owner of non-riparian land. See *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155, 161. Conversely it would seem capable of reservation. That the non-riparian cannot get the full right of a riparian, however, is well settled in England, where the inland proprietor may not recover from a riparian

who pollutes the stream. *Stockport Waterworks Company v. Potter*, 3 H. & C. 300. Nor may he sensibly affect the flow to other proprietors. *Ormerod v. Todmorden Joint Stock Mill Co.*, *supra*. Some American cases take the opposite view. *Doremus v. Mayor, etc. of Paterson*, 63 N. J. Eq. 605, 52 Atl. 1107; *St. Anthony Falls Water-Power Co. v. City of Minneapolis*, 41 Minn. 270. It would seem that these natural rights of riparian ownership should be kept strictly appurtenant to riparian land. Nor should a new easement be established by conferring upon the inland proprietor any property right even though less comprehensive than that of riparian ownership,¹ for public policy should oppose any such extension of outstanding rights of property which interfere materially with the enjoyment of land in the hands of subsequent purchasers. But see *Butler Hard Rubber Co. v. Mayor, etc. of Newark*, 61 N. J. L. 32. Such a separation of property rights would likely prove both inconvenient and economically detrimental. The best view would seem to be that the grant or reservation amounts to a mere covenant between the parties. The court in the principal case adopted this view and refused specific performance of the covenant since continuous supervision would be required.

BOOK REVIEWS.

A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES. By Clement L. Bouvé. Washington, D. C.: Byrne and Company. 1912. pp. xxvi, 915.

All independent states have the inherent sovereign power to regulate or even prohibit the entrance of aliens. Most, if not all, have at various times exercised it, but none has been called upon to do so to such an extent as the United States; nor has anyone, with the possible exception of Canada, devised so intricate a system for sifting of aliens seeking to enter. For this there is good reason, for about twenty million aliens have come here since 1880, and in the last ten years they have been coming at the rate of approximately eight hundred thousand per annum. The present list of excluded classes is the growth of many years. The federal law of 1875 excluded only criminals and prostitutes, whereas to-day the following classes, amongst others, are excluded:

- Idiots, imbeciles, feeble-minded persons, and epileptics.
- Insane persons and those who have been insane within five years.
- Persons who at any time have had two or more attacks of insanity.
- Paupers and persons likely to become a public charge.
- Persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease (including trachoma).
- Persons suffering from any mental or physical defect which may affect their ability to earn a living.
- Criminals, polygamists, and anarchists.
- Prostitutes, procurers, and "persons who are supported by or receive in whole or in part the proceeds of prostitution."
- Persons coming to perform manual labor under contract made abroad.
- Persons whose ticket or passage has been paid for by any association, municipality, or foreign government.
- Children under sixteen unaccompanied by either parent, except in the discretion of the Department.

Even a cursory glance at this list shows that grave administrative difficulties must often be encountered in determining who come within the designated classes, this being particularly true as to who are paupers, persons likely to become a public charge, and persons suffering from physical defects which may

affect their ability to earn a living. It is also evident that any effective administration of the law requires the services of numerous skilled medical officers, and that the task of determining which of eight hundred thousand persons a year are suffering from any of the mental defects indicated is an enormous one. Congress has confided all of this work to the executive branch of the Government, and it has been discharged successively through the Treasury Department and the Department of Commerce and Labor, and will from now on be discharged through the recently created Department of Labor. Elaborate machinery is necessary for its performance; the same can be best observed at Ellis Island, through which eighty per cent, more or less, of all of the immigrants who come to the United States pass. Congress at an early date recognized the impossibility of detecting all of those who belong to the excluded classes during the short period available for their inspection at their arrival, and, therefore, wisely added provisions under which those who may enter in violation of law (as well as certain other classes not necessary to be mentioned here) can within a certain period, usually three years, be expelled by the executive authorities.

The immigration law applies to all aliens, including the Chinese; but the exclusion of the Chinese is further governed by a special law much more drastic than the immigration law, which latter it is rarely found necessary to apply to the Chinese. Some of the differences in the machinery for the enforcement of the two measures are the following. Under the immigration law, (a) aliens applying for admission are examined by an inspector, who, if not satisfied that they are "clearly and beyond a doubt" entitled to land, detains them for examination by a board of special inquiry consisting of three inspectors; and (b) aliens found after entry unlawfully in the country are arrested and expelled by an order (known as a warrant) of the Department after a hearing before an immigration official designated by him. Under the Chinese exclusion law, (a) Chinese applying for admission are examined by an inspector who reports to the immigration official in charge at the port, and the latter (not a board of special inquiry) determines whether the applicant shall be admitted or rejected; and (b) Chinese found after entry unlawfully in the country are arrested either on a warrant of the Department and given a hearing of the character above referred to, or they are arrested on a warrant issued by a United States judge or commissioner (usually the latter), and given a judicial or quasi-judicial trial to determine whether they are entitled to be and remain here.

The book here subject to review deals with and explains these matters, which have never heretofore been made the subject of special treatment, though they are of great and growing importance. It includes also a discussion of the general principles, international and municipal, governing the exclusion and expulsion of aliens, and an interesting chapter entitled "Status," dealing amongst other things with the somewhat complicated and indefinite topic of the rights of aliens under international and municipal law, with the standing of aliens who become domiciled, and with that of "seamen," to whom the immigration law applies only in a very limited sense. We may not agree with all that the writer says concerning the inapplicability of the immigration law to some domiciled aliens (matters upon which the Supreme Court has not yet finally passed — the *Lapina* case will be argued shortly), but they are nevertheless interesting and suggestive. The writer further explains at length the principal processes of inspection and other details of the machinery of the law, and gives an outline of the "procedure" followed by the immigration authorities and little understood by those who have not had to do with these laws.

Notwithstanding the statutes declare the decision of the immigration authorities to be final, yet the courts undertake to look into the same sufficiently to determine whether or not they have given the alien a "fair hearing." This

important matter is carefully discussed in a separate chapter entitled "Judicial Review of Administrative Decisions." There is appended also a valuable table of cases which brings together for the first time all decisions rendered by the courts under both the Chinese Exclusion and Immigration Laws. One is at once impressed with the fact that most of these cases arise under the former law, over the administration of which the courts are, as already stated, granted certain statutory jurisdiction. In connection with the attempts made to secure a judicial review of the actions of the executive authorities under the immigration law the author might have advantageously emphasized more strongly than he has done the fact that such attempts almost always fail. During the past year only thirty-five writs were issued against the Ellis Island authorities, though during this time some seventy thousand of the eight hundred thousand arriving aliens were detained for special inquiry and ten thousand deported, approximately; and of these thirty-five writs only two were upon their return sustained. The number of writs will be still smaller if the sworn petition presented to the court were required to show wherein the executive authorities were supposed to have violated the law by facts, and if the mere conclusions of attorneys as to such supposed violations were rejected.

The author devotes a chapter to the discussion *seriatim* of the sections of the present immigration law, each of which he sets out in full. This course has disadvantages arising out of the fact that Congress has legislated most unintelligently as regards the order in which it has placed the various provisions of the law. That which is important is mingled with that which is unimportant, provisions that should follow each other are widely separated, and matters of vital substance are found buried in unimportant detail. One of the many illustrations of this is the relegating of the supremely important provision as to the holding of doubtful aliens for special inquiry to the last lines of a section (24) which deals largely with the grades of employees and their salaries. The discussion of the several provisions of the law would be much more useful to him who is not fully acquainted with its intricacies if the material ones were segregated and discussed in their proper order and relation to each other.

The author has perhaps devoted too much space to reproduction and discussion of the Department "Rules," made to assist in the execution of the statute. These are subject to frequent change and are at all times readily obtainable from Washington in pamphlet form. On the other hand it would undoubtedly be of interest to many if in another edition the author were to develop further the methods by which the board of inquiry seeks to elicit the relevant facts and to insert perhaps two or three well-considered records. It would be well also for him to deal more fully with the expressions "likely to become a public charge" and "suffering from a physical defect which may affect ability to earn a living," and to show in greater detail the various points which the immigration authorities usually consider in determining whether or not aliens come within these excluded classes.

Appendix "A" collates (for the first time, we believe) the laws of other countries regarding the exclusion and expulsion of aliens.

The book is full of useful and interesting information, and should be in the possession of all concerned in the execution of the immigration or the Chinese exclusion law.

W. W.

THE FOURTEENTH AMENDMENT AND THE STATES. By Charles Wallace Collins. Boston: Little, Brown, and Company. 1912. pp. xxi, 220.

This book explains the origin of the Fourteenth Amendment, the enlarging view which the courts have taken as to its scope, the kind of cases actually arising under it, the objections now made, and possible remedies. The book is interesting throughout; but perhaps the most striking parts are those in

which the author gives the figures as to the number of cases, their nature, and their geographical distribution. Some of the results are these: In the first sixteen years of the Amendment, thirty-five cases in the Supreme Court of the United States, but recently an annual average of about thirty-one a year, the Amendment being at present "the chief source of litigation among all the provisions of the federal Constitution" (p. 28); six hundred and four decisions under it by the United States Supreme Court, twenty-seven being as to eminent domain, one hundred and forty-four as to taxation, one hundred and forty-six as to procedure, and three hundred and two as to police power (pp. 31, 33); only twenty-eight cases in the Supreme Court as to negro race problems (pp. 38, 48); one hundred and seventeen cases from the East, two hundred and eleven from the South, and two hundred from the West, as "the battle-ground of the Amendment is at present in the West and the Southwest" (p. 38). This, however, is a mere skeleton of the results, and the book itself should be referred to for details and also for tables classifying the cases by states, years, and topics. The author's opinion is that the Fourteenth Amendment, in so far as it was intended to elevate the negro race, has been unsuccessful (p. 161), and that in so far as it goes beyond the protection of the negro race it has resulted in unsatisfactory and harmful restrictions upon the states and in excessive litigation in federal courts (p. 163). He suggests that, although repeal is impracticable, there may be an adequate remedy found in statutes, for example, in one limiting the right to writs of error in Fourteenth Amendment cases, or in one providing that no State law shall be overthrown under this Amendment by the Supreme Court of the United States unless the opinion be unanimous (pp. 166, 167).

The book does not deal with the relation of the Fourteenth Amendment to the Fifth Amendment, or to provisions in constitutions of the several states; and it does not present the history of the extension of the phrase "due process of law" to matters outside procedure. In other words, the work does not cover all the possible ground. Yet it does cover, and in a way that is clear and interesting, quite as much ground as is necessary in order to make it worth reading and to justify its full title: "The Fourteenth Amendment and the States — a study of the operation of the restraint clause of section one of the Fourteenth Amendment to the Constitution of the United States."

FEDERAL COURTS AND PRACTICE. By John A. Shields. New York: The Banks Publishing Company. 1912. pp. v, 874.

This book is a compilation of information on various disconnected subjects rather than a legal treatise. The first fifty pages are a condensed and somewhat superficial history of the Supreme Court and its Justices. The next one hundred and fifty pages contain a general outline of the statutory organization of inferior federal courts. Part II, containing four hundred pages, is entitled "Trust Prosecutions, Decisions, and Decrees." Voluminous quotations from opinions, pleadings, briefs and arguments of counsel, magazine articles and public speeches, consume more than half of this space.

The following two hundred pages contain what the author terms a "Syllabus of Equity." Here are collected syllabi of equity cases, one following another without explanation and with little regard to logical arrangement. As a rule the decisions from which statements are taken are not cited. This defect prevails throughout the whole book.

The balance of the book embraces a range of subjects, including the statutory organization of various governmental departments and the duties of various officials; also twenty pages of quotations from addresses and political speeches on the subject of "The Recall of Judges."

The information contained in the book is at times incorrect, and the language is in many places so loose and general that it is misleading. It is doubtful if the work will serve any particular purpose.

J. M. B., Jr.

TAXATION IN MASSACHUSETTS. By Phillip Nichols. Boston: The Financial Publishing Company. 1913. pp. xlv, 826.

This is an excellent book on a rather obscure but very important subject, by a man whose experience as Assistant Corporation Counsel of the City of Boston has led him to a thorough study of the subject. The principles of the laws of taxation are not generally studied with as great care as many other branches of the law of far less practical importance. In this book Mr. Nichols has dealt with the subject both scientifically and practically. His brief but complete consideration of the limitations of the power of taxation by the Constitution and otherwise, his historical statements on the origin and development of the annual direct tax, the taxation of corporations, the inheritance tax and special assessments, his careful annotation of the statutes, section by section, and his collection of forms make his book a far more valuable one than the ordinary local manual. The book may be equally commended to the lawyers in practice and to the students of taxation in its economic as well as its legal aspects.

J. H. B.

HARVARD LAW REVIEW.

VOL. XXVI.

JUNE, 1913.

No. 8.

THE POWER OF CONGRESS TO ENACT INCORPORATION LAWS AND TO REGULATE CORPORATIONS.

I. THE POWER OF CONGRESS TO ENACT INCORPORATION LAWS.

THE formation of corporations is not a primary purpose or power of the national government. Corporations are not mentioned in the Constitution. But, subject to the limitations expressly imposed by the Constitution, Congress has power to enact laws to execute any of the purposes or powers entrusted by the Constitution to the national government; and, therefore, Congress can pass an act of incorporation, or an act regulating corporations, if such an act is merely a means of executing some constitutional purpose or power.

In 1791 the first Congress passed a bill incorporating the Bank of the United States, a private stock corporation with power to establish branches and to engage in a general banking business. President Washington called upon Thomas Jefferson, the Secretary of State, and Edmund Randolph, the Attorney-General, for opinions as to the constitutionality of the bill. Their opinions being adverse, the President called upon Alexander Hamilton, who was Secretary of the Treasury and had been the principal author of the bill, to state the reasons which induced him to consider the bill constitutional. Hamilton submitted a persuasive

opinion in favor of the constitutionality of the bill,¹ which thereupon was signed by the President. The charter of the bank expired in 1811 and for political reasons Congress refused to renew it; but in 1816 Congress passed an act chartering the second Bank of the United States, which also was a private stock corporation with power to establish branches and to engage in a general banking business throughout the United States. The United States was a shareholder in the bank, and the latter was constituted a depository of the United States government. In the case of *M'Culloch v. Maryland*² the Supreme Court decided that the act incorporating the bank was constitutional because the creation of such a banking corporation was an appropriate instrument for conducting the fiscal operations of the government. The court held that the creation of a corporation was not a substantive and independent governmental purpose, but was merely a means employed to effect some ulterior purpose; that, except so far as expressly limited by the Constitution, Congress was impliedly empowered to resort to any appropriate means of effecting any of the constitutional purposes of the national government; that it was not a subject of controversy that the creation of a banking corporation was a convenient, useful, and essential means for carrying on the fiscal operations of the government, and that there was no reason why Congress should not resort to the creation of a corporation for that purpose.³

In 1863 and 1864 Congress passed general acts for the incorporation of national banks. In *Farmers' and Merchants' National Bank v. Dearing*⁴ the Supreme Court said:

"The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *M'Culloch v. Maryland* (4 Wheat. 316) and in *Osborn v. Bank of the United States* (9 *id.* 708) therefore applies. The national banks organized under the act are instruments designed to be used

¹ Hamilton's opinion is printed in the edition of *The Federalist* edited by Paul Leicester Ford, published by Henry Holt & Co. in 1898.

² 4 Wheat. (U. S.) 316 (1819). See also *Osborn v. Bank of the United States*, 9 Wheat. (U. S.) 738, 859 (1824).

³ See the opinion of Chief Justice Marshall, 4 Wheat. (U. S.) 411, 422, 423 (1819).

⁴ 91 U. S. 29 (1875).

to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge."

Although undoubtedly the court was right in sustaining the constitutionality of the National Bank Act, the grounds upon which the court based its conclusion seem questionable. The act incorporating the Bank of the United States was sustained because it was created to serve as an instrument of the government in carrying on its fiscal operations; but the constitutionality of a general act for the incorporation of an unlimited number of banks to engage in a general banking business for the profit of their stockholders cannot fairly be based on that ground.⁵ Under the National Bank Act more than seven thousand banks have been formed, many of them having a capital of only \$25,000 and supplying only local needs of banking facilities. An assertion that all these banks were incorporated to serve as instruments of the government in the administration of its fiscal operations would seem little more than a pretense. A sounder and better ground for sustaining the constitutionality of the National Bank Acts appears to be the power conferred by the Constitution upon Congress "to regulate commerce with foreign nations, and among the several states." Even in 1791, when the commerce of the United States was in its infancy, Alexander Hamilton assigned the commerce clause of the Constitution as a ground for sustaining the constitutionality of the act incorporating the first Bank of the United States. In modern times a sound banking system and adequate banking facilities are as essential to interstate and international commerce as are railways and steamship lines.

⁵ In *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 860 (1824), Chief Justice Marshall said: "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of *M'Culloch v. The State of Maryland*, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

In the case of *California v. Pacific Railroad Companies*⁶ the Supreme Court sustained the constitutionality of the acts of Congress incorporating the Pacific Railroad Companies. Mr. Justice Bradley, delivering the opinion of the court, said:

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce."⁷

In *Luxton v. North River Bridge Co.*⁸ the Supreme Court sustained the constitutionality of the act of Congress incorporating the North River Bridge Company for the construction of a bridge across the Hudson River between the states of New York and New Jersey. The court held that

"although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two States across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water."⁹

Congress possesses all sovereign powers of government in the territories of the United States, and may establish territorial governments with general legislative powers. Therefore Congress has power to pass special or general laws authorizing the formation of corporations for any purposes within the territories, and this power may be delegated to the respective territorial legislatures.¹⁰ Congress also may charter corporations in the

⁶ 127 U. S. 1 (1887).

⁷ 127 U. S. 39 (1887). Congress also has granted a charter to the Nicaragua Canal Company.

⁸ 153 U. S. 525 (1894).

⁹ 153 U. S. 525, 530 (1894).

¹⁰ *Mormon Church v. United States*, 136 U. S. 1, 42 (1889), and cases cited; *Vincennes University v. Indiana*, 14 How. (U. S.) 270 (1852); *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539 (1831) and cases cited.

District of Columbia.¹¹ However, the franchises of a territorial corporation do not extend beyond the territory in which it was incorporated, and the franchises of a corporation chartered by Congress under its legislative powers over the District of Columbia do not extend beyond the District. Such corporations may carry on their authorized business and operations in the several states only so far as permitted by the states.

II. NATIONAL INCORPORATION OF TRADING COMPANIES.

The grant by the Constitution of power "to regulate" interstate and international commerce has been construed by the Supreme Court as constituting, in effect, a grant of power to legislate generally in respect of such commerce. It has been held that Congress not only has power to regulate interstate and international commercial transactions and to prescribe police regulations for the government of interstate and international commerce,¹² but also has power to pass laws prohibiting restraints of such commerce,¹³ and laws to provide the public with suitable instrumentalities or facilities for the transaction of such commerce, such as railways, bridges, and telegraph lines,¹⁴ as well as laws regulating the business and operations of public carriers and of others engaged in a business of a public character and serving the public as instrumentalities for the transaction of such commerce.¹⁵

Soon after the adoption of the Constitution, when the interstate and international commerce of the United States was comparatively small, Hamilton pointed out that "the fact that all the principal commercial nations have made use of trading corporations is a satisfactory proof that the establishment of them is an incident to the regulation of commerce."¹⁶ In modern times a

¹¹ *Hadley v. Freedman's Savings Bank*, 2 Tenn. Ch. 122, 126 (1874); *Williams v. Creswell*, 51 Miss. 817, 822 (1876).

¹² *Lottery Case*, or *Champion v. Ames*, 188 U. S. 321 (1902); *Reid v. Colorado*, 187 U. S. 137 (1902); *In re Rahrer*, 140 U. S. 545 (1890).

¹³ For example, the Anti-Trust Act of 1890.

¹⁴ *Cases supra*.

¹⁵ Compare the Interstate Commerce Act, approved February 4, 1887, and its various amendments; the "Elkins Act," approved February 19, 1903; the Act to promote the safety of employees and travellers upon railroads, approved March 2, 1903, and the Employers' Liability Act, approved April 5, 1910.

¹⁶ Hamilton's opinion as to the constitutionality of the Bank of the United States, Ford's edition of *The Federalist*, page 677.

very large part of interstate and international trade is carried on by means of corporate organizations and the right to form corporations to carry on such trade has become a practical necessity. An act of Congress authorizing the formation of such corporations could, therefore, justly be sustained on the ground that the right to form corporations is necessary to the convenient and effective transaction of interstate and international trade.

If the several states should refuse or fail to provide adequate facilities for the formation of corporations to engage in interstate and international trade, the need of national legislation would become obvious; but the fact that the several states have enacted laws authorizing the formation of corporations to engage in interstate and international trade would not impair or limit the power of Congress to enact such laws, if Congress could exercise this power in the absence of all state legislation. On the contrary, the diversity of the corporation laws of the several states; the practice which has grown up of forming corporations under the laws of certain states for the purpose of carrying on business principally, or wholly, in other states; the attempts of some of the states to increase their income from corporation fees and taxes, by inviting the formation of corporations under laws conferring wide powers and containing few restrictive regulations for the protection of the public; and the policy adopted by other states of imposing burdensome restrictions upon foreign corporations; — all would furnish additional grounds for national legislation authorizing the formation of interstate trading corporations governed by uniform regulations with respect to their organization, their powers, and their management, and vested by Congress with the right to carry on their business throughout the United States.

In his opinion on the constitutionality of the charter of the first Bank of the United States, Hamilton said:

“It is conceded that implied powers are to be considered as delegated equally with express ones. Then it follows, that as a power of erecting a corporation may as well be implied as any other thing, it may as well be employed as an instrument or mean of carrying into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance, the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends

of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the federal government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage.

"A strange fallacy seems to have crept into the manner of thinking and reasoning upon the subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great independent substantive thing; as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or mean to an end. Thus a mercantile company is formed, with a certain capital, for the purpose of carrying on a particular branch of business. Here the business to be prosecuted is the end. The association, in order to form the requisite capital, is the primary mean. Suppose that an incorporation were added to this, it would only be to add a new quality to that association, to give it an artificial capacity, by which it would be enabled to prosecute the business with more safety and convenience."¹⁷

III. FRANCHISES OF NATIONAL CORPORATIONS.

Power in Congress to pass a national incorporation law implies power, (a) to confer upon a corporation formed under the law the legal right or franchise to act in a corporate capacity in carrying on its business and operations throughout the United States, without regard to state lines, and (b) to prescribe the method of organizing the corporation, to define the terms and effect of the charter contract among the shareholders, and to regulate the internal affairs of the corporation, including the rights and obligations of its shareholders and the method of winding up its affairs in case of dissolution or insolvency.

Whether Congress can confer upon a corporation special rights or franchises, in addition to the right to act in a corporate capacity, depends upon the purposes of the corporation and the nature of

¹⁷ Ford's edition of *The Federalist*, page 657. See also the opinion of Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 411, 421 (1819).

the special rights. The constitutionality of such a grant of special rights could not be based on the ground that the corporation was formed under an act of Congress. Congress could grant special rights to a national corporation only if it could constitutionally grant such special rights to an unincorporated association or to a state corporation for similar purposes. Thus, if the purpose of a national corporation or of a state corporation is to build a railroad or bridge to serve the public as an instrument of interstate commerce, Congress may confer upon it the right to condemn property for that purpose and may confer all powers necessary to enable the corporation to establish and operate its railroad or bridge. If the purpose is to serve the national government as an instrument for carrying on some governmental function or activity, Congress may confer upon the corporation all powers necessary for the performance of this function or activity throughout the United States.¹⁸

The act of Congress incorporating the second Bank of the United States conferred upon the bank the right to engage in a general private banking business throughout the United States, and the constitutionality of the grant of this right was sustained on the ground that the bank could not serve the national purpose for which it was established unless authorized to engage in a general banking business.¹⁹ The same rule was applied to the provisions of the National Bank Act under which numerous banks have been organized to carry on a general banking business for the profit of their shareholders. Similarly, the constitutionality of the acts incorporating the Pacific Railroad Companies was sustained although these companies were authorized to engage in intrastate as well as interstate transportation and to carry on their business and operations like other railroad companies in the several states. These powers were necessary to enable these corporations to accomplish the national purposes for which they were established.

Assuming that Congress has constitutional power to enact a law for the incorporation of companies to engage in interstate or international trade, a question may arise whether Congress could authorize such companies to engage incidentally in intrastate

¹⁸ See the opinion of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 861, 862 (1824). See *Thomson v. Union Pacific R. Co.*, 9 Wall. (U. S.) 579 (1869).

¹⁹ *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 739 (1824).

commerce, or to carry on a general trading business, including not only interstate or international trade but also intrastate trade. The argument in favor of the constitutionality of such a law would not be as strong as the argument in favor of the constitutionality of a law for the incorporation of a bank to serve as fiscal agent of the government, with power to engage in a general banking business, or of a law for the incorporation of a railway company to furnish a highway of interstate commerce, with power to engage in a general railroad business. It may, however, be urged with much force that authority to engage in trade generally, including intrastate trade, is a practical necessity to enable a corporation to serve as a means or facility for the transaction of interstate and international commerce. Commerce is not governed by state lines, and the business of a partnership or of a corporation rarely consists wholly of interstate or international commerce, or wholly of intrastate commerce. To authorize the formation of a trading corporation or copartnership with no power to engage in any commerce except interstate and international commerce would be useless. If Congress cannot authorize the formation of corporations to engage in interstate and international commerce with incidental power to engage in trade generally, the right to use a corporate organization as a means of carrying on interstate and international commerce would depend wholly upon the laws of the several states, though the national government alone has constitutional power to control and to regulate such commerce.

IV. NATIONAL LEGISLATION RELATING TO NATIONAL CORPORATIONS.

Power in Congress to pass an act of incorporation does not include power to legislate generally concerning the legality of the transactions of a corporation formed under the act, or concerning its property rights, contracts, and liabilities in the several states. Such general legislation, though embodied in the act of incorporation, could not be sustained as a regulation for the government of the corporation, or as a limitation of its corporate powers.

Of course Congress can regulate the transactions of national corporations to the same extent as the transactions of state corporations or of individuals. Thus Congress can regulate their

interstate and international commerce; and the business of a corporation operating a highway of interstate commerce or acting as a public interstate carrier is subject to regulation by Congress whether the corporation was formed under an act of Congress or under a state law. Furthermore, if a corporation should be used by the national government as a means of executing any of its constitutional purposes or powers, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to secure the execution of the governmental purpose or power. Thus if Congress should use a corporation as a means of providing a highway, or a railway line, or other transportation facilities for the interstate commerce of the people, or for the postal and military operations of the government, Congress could enact laws governing the transactions, property rights, contracts, and liabilities of the corporation so far as necessary to attain these governmental purposes in a safe and effective manner.²⁰ Similarly, Congress can legislate concerning the acts and dealings of national banks so far as may be needed to effect the national purposes served by them.²¹ However, the constitutionality of such legislation would not be based on the ground that the corporations to which it applies were formed under an act of Congress. It would be based wholly upon the character of the business or transactions to which the legislation relates, or upon the fact that the corporations were employed by the government as instrumentalities to execute some constitutional purpose or power of the government. Congress could enact such legislation applicable to individuals or to state corporations under like conditions.²²

If Congress should pass a law for the incorporation of private trading companies to engage in interstate or international trade, Congress would have the sole power to regulate their interstate or

²⁰ Compare the Acts relating to the Pacific Railroad Companies, the Interstate Commerce Acts, the Safety Appliance Acts and the Employers' Liability Acts; and see the Second Employers' Liability Cases, 223 U. S. 1 (1912) and cases cited. It should be observed that the power of Congress to pass such legislation applicable to railway lines used in the postal and military operations of the Government would not depend upon the fact that the lines were interstate lines or were used in the transaction of interstate commerce.

²¹ See *Farmers', etc. Bank v. Dearing*, 91 U. S. 29 (1875); *Davis v. Elmira Savings Bank*, 161 U. S. 275 (1896).

²² See the opinion of Chief Justice Marshall in *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 862-864 (1824).

international commerce, to limit their corporate purposes and powers, and to regulate their management and internal affairs, but their intrastate commerce, and their property rights, contracts, and liabilities in the several states could not be regulated by Congress and would be governed by the laws of the states.

V. STATE LAWS AFFECTING NATIONAL CORPORATIONS.

The rule that the operation of a constitutional law enacted by Congress cannot be controlled or limited by state legislation applies to national acts of incorporation. Thus a state cannot by law interfere with the operation of the provisions of the National Bank Act relating to usurious transactions of national banks,²³ or to the winding up of national banks and distribution of their assets in case of insolvency.²⁴ Similarly a state cannot by law prohibit a national bank from receiving deposits when insolvent and impose a penalty upon the officers of a bank violating the prohibition.²⁵ It is clear also that the states cannot constitutionally defeat the purpose or impair the efficiency of a corporation established under authority of a national law as an instrumentality or agency of the national government, even though no express provision of the national law be infringed.²⁶ However, subject to the limitations above stated, national corporations are subject to the operation of the general laws of the several states. In *First National Bank v. Kentucky* ²⁷ Mr. Justice Miller used the following language:

"They [national banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

²³ *Farmers', etc. Bank v. Dearing*, 91 U. S. 29 (1875).

²⁴ *Davis v. Elmira Savings Bank*, 161 U. S. 275 (1896). See also *Rankin v. Barton*, 199 U. S. 228 (1905).

²⁵ *Easton v. Iowa*, 188 U. S. 220 (1903).

²⁶ See *M'Culloch v. Maryland* and *Osborn v. Bank of United States*, *supra*.

²⁷ 9 Wall. (U. S.) 353 (1869). See also *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5.

VI. STATE TAXATION OF NATIONAL CORPORATIONS.

Congress may exempt from state taxation the business and operations of a national corporation serving the government as an instrument in the execution of some governmental purpose or power, or serving the public as an instrument of interstate or international commerce, and it seems that Congress also may exempt from state taxation any property held and used by such a corporation in the service of the government or of the public. The power of Congress to exempt the business or property of such a corporation from state taxation would not be based upon the corporate character of the organization or upon the fact that the corporation was chartered by Congress, but it would be based upon the purposes of the corporation and the governmental or public uses to which its property was devoted. Congress could grant such an exemption to a national corporation only if it could constitutionally grant a similar exemption to state corporations or to individuals under similar circumstances.²⁸

In the absence of an express exemption from state taxation, the rule appears to be as follows: The right or franchise to carry on the business or operations of a corporation formed by authority of the national government to serve as a governmental agency or to serve the public as an instrument of interstate or international commerce cannot be taxed by the states, but the property of the corporation may be taxed by the states in the same manner as the property of individuals and state corporations, provided that the governmental or public purposes of the corporation be not impaired. If, however, a corporation was not formed to serve as an agency of the government or to serve a public use, but was formed merely to serve its shareholders as a means of carrying on interstate or international trade for private profit, the corporation and its transactions would be subject to taxation and to other state legislation to the same extent as individuals and unincorporated companies engaged in a similar business. Only the interstate and international commerce of such a corporation and its right or franchise to be a corporation and to act in a corporate capacity would be exempt from state taxation.

²⁸ Cf. *Thomson v. Railroad Co.*, 9 Wall. (U. S.) 579 (1869); *Railroad Co. v. Peniston*, 18 Wall. (U. S.) 5 (1873).

In *M'Culloch v. Maryland*²⁹ the Supreme Court decided that a statute of the state of Maryland prohibiting the Bank of the United States from issuing notes within the state except upon payment of a tax to the state and imposing a penalty upon officers of the bank violating this prohibition was unconstitutional, because it was a tax on the operations of the bank and consequently on the operations of an instrument employed by the government of the Union to carry its powers into execution. But the court pointed out that a state could impose a tax on the real property of the bank in common with other real property within the state, or a tax upon the interest of citizens of the state in the bank in common with other property of the same description throughout the state.³⁰

Similarly, in cases involving the constitutionality of state taxes imposed upon railroad companies authorized by Congress to build and maintain interstate lines of railway the Supreme Court held that a state could not constitutionally tax the franchise or right to carry on their operations conferred upon these companies by the United States, whether the companies were incorporated under the laws of the United States or under state laws,³¹ but that a state could tax the property of these companies equally with other property within its jurisdiction.³²

VII. NATIONAL CONTROL AND REGULATION OF STATE CORPORATIONS.

Congress has power to regulate the interstate and international commerce of state corporations to the same extent as that of

²⁹ 4 Wheat. (U. S.) 316 (1819).

³⁰ 4 Wheat. (U. S.) 436 (1819). In *Osborn v. Bank of the United States*, the court held that a tax imposed by the state of Ohio upon the bank for each office of discount and deposit maintained by it within the state was unconstitutional because a tax upon the business or franchise of the bank.

The power of the states to tax the property of national banks and the shares of their stockholders is regulated by the National Bank Act. (U. S. Rev. Stat., Sec. 5219.) See *Covington v. First Nat. Bank*, 198 U. S. 100 (1904); *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664 (1899); *Van Slyke v. Wisconsin*, 154 U. S. 581 (1871); *Aberdeen Nat. Bank v. Chehalis County*, 166 U. S. 440 (1897); *National Bank v. Commonwealth*, 9 Wall. (U. S.) 353 (1869).

³¹ *California v. Pacific Railroad Co.*, 127 U. S. 1, 40 *et seq.* (1887).

³² *Thomson v. Union Pacific R. Co., Eastern Division*, 9 Wall. (U. S.) 579 (1869); *Union Pacific R. Co. v. Peniston*, 18 Wall. (U. S.) 5 (1873). See also *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 531 (1888).

partnerships and of individuals, and there appears to be no constitutional reason why Congress should not enact regulations applicable only to the commerce of corporations.

A plan has been suggested of regulating state corporations engaged in interstate or international commerce by an act of Congress prohibiting them from engaging in such commerce, except upon obtaining from some government official a license to be issued only upon compliance with prescribed regulations with respect to the issue of their stocks and bonds, the conduct of their business and the management of their internal affairs. Against the constitutionality of such legislation it may be urged that the right of corporations, as well as of partnerships and individuals, to engage in interstate and international commerce is not derived from the national government and does not exist merely by grace or license of that government; that the Constitution does not confer upon Congress power to prohibit interstate or international commerce, but only confers power to regulate it; that the power of regulation extends only to acts done in carrying on commerce and to matters connected directly with the transaction of commerce;³³ and that the organization, powers, and internal affairs of trading corporations are not directly connected with the transaction of commerce, but bear only a remote relation thereto.

Strong arguments, however, can be advanced in support of the constitutionality of such legislation. No state can confer a legal right or franchise to act in a corporate capacity in other states, and Congress alone is vested by the Constitution with the power to legislate for the regulation of interstate and international commerce. The organization, powers, and financial condition of a trading corporation may have a direct and important relation to the transaction of interstate and international commerce, and may be of such a character as to render the commercial operations of the corporation a menace to the security and welfare of the people of all the states. A statute prohibiting the transaction of interstate commerce by means of a corporate organization which is a menace

³³ Thus although the products of agriculture and of manufacturing may become important objects of trade and commerce, Congress cannot on that account regulate agriculture or the business of manufacturing. Agriculture and manufacturing are not in themselves commerce or any part of commerce, and they have no direct connection with the transaction of commerce.

to the security of the public would seem justifiable as an exercise of the police power over interstate commerce and as a regulation of such commerce within the meaning of the Constitution. Furthermore, if interstate and international commerce cannot be carried on in an orderly manner and with safety to the public by a multitude of corporations organized under the diverse and varying legislation of forty-eight different states and subject in each state to special regulations and restrictions, it would seem justifiable, under the power to regulate interstate and international commerce, to require all corporations engaging in such commerce to comply with any appropriate regulations for the protection of the public and also to confer upon all corporations complying with the prescribed regulations a legal right or franchise to carry on their interstate and international commerce throughout the United States, free from restrictions imposed by the several states.

Congress has power to require corporations and other associations engaged in interstate or international commerce to file reports as to their organization, powers, and financial condition.³⁴ Congress also may provide for the appointment of officers and commissions to act as police of interstate commerce and to administer and enforce all constitutional regulations prescribed by law.³⁵ Congress, therefore, may vest in a national commission or in some public officer all necessary powers for the enforcement of any constitutional regulations enacted by Congress with respect to trading corporations engaged in interstate or international commerce. Such a commission or public officer may be required by law to issue to every corporation that shall have complied with the prescribed regulations a certificate of such compliance in the form of a license; and there seems to be no good reason why such certificates should not be made *primâ facie* evidence of compliance with the prescribed regulations, or why corporations should not be prohibited from engaging in interstate or international commerce until they shall have obtained such certificates.

The power of Congress to enact such legislation would not be based upon the theory that the right to transact interstate and

³⁴ See the Interstate Commerce Act of February 4, 1887, with its amendments, and the Act of February 14, 1903, establishing the Department of Commerce and Labor and providing for the appointment of a Commissioner of Corporations.

³⁵ See the Interstate Commerce Act of February 4, 1887, and its amendments.

international commerce through a corporate organization was derived from Congress or was conferred by national license, or upon the theory that Congress has power to regulate the organization, powers, or management of state corporations. It would be based upon the theory that a corporate organization is but a means of transacting commerce, and that under its power to regulate interstate and international commerce Congress can prohibit the transaction of such commerce by means of any corporate organization which in its opinion is unsafe or otherwise prejudicial to the interstate commerce of the public.

An attempt on the part of Congress to control or regulate state corporations by means of the imposition of prohibitory excise taxes should not be countenanced. It has been asserted that a legislature may use its taxing power not only as a means of raising revenue, but also as a means of securing by indirection results which the legislature could not constitutionally attain by direct legislation; and in support of this assertion reference has been made to the *dictum* of Chief Justice Marshall that "the power to tax involves the power to destroy."³⁶ This *dictum*, like other striking phrases of that great jurist, has sometimes been quoted without reference to its context and in support of doctrines which it does not justify. The statement that "the power to tax involves the power to destroy" was made in support of the conclusion that a state could *not* tax the operations of an instrument of the national government and thus control its constitutional measures; but Chief Justice Marshall certainly did not mean to imply that the taxing power could constitutionally be used as a pretext for the accomplishment of an unconstitutional object. That this was not his meaning is apparent from his statement in the same case that "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." Undoubtedly, the courts would not be justified in scrutinizing the reasonableness of a tax, or the wisdom or motive of Congress in imposing it; but if it should appear plainly that a law nominally imposing a tax was not really a

³⁶ *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316, 431 (1819).

revenue measure, but in fact was an act of confiscation, or a mere pretext for the accomplishment of some purpose not warranted by the Constitution, the Supreme Court could not sustain such a law without abdicating its highest function and permitting the practical nullification of the Constitution itself.⁸⁷

Victor Morawetz.

NEW YORK CITY.

⁸⁷ See, however, the opinion of Mr. Justice White in *McCray v. United States*, 195 U. S. 27 (1903). In this case the Supreme Court refused to declare unconstitutional a tax on the manufacture of artificially colored oleomargarine, though the tax obviously was not a revenue measure, and held that the right to manufacture artificially colored oleomargarine was not protected by the Constitution. The decision of the Supreme Court in *Veazie v. Fenno*, 8 Wall. (U. S.) 533 (1869) that the imposition by Congress of a prohibitory tax upon state bank notes was constitutional may be sustained on the ground that Congress could absolutely prohibit the issue of such bank notes as a necessary incident to the creation of the national banking and currency system.

THE IMPEACHMENT OF THE FEDERAL
JUDICIARY.*

THE principles which govern impeachment in the United States have long been clouded in an atmosphere of mystery. This unsettled condition of the law has been due to a paucity of precedent resulting from the infrequency with which the remedy has been invoked, and to the anomalous scheme of trial whereby the Senate pronounces its findings of fact and conclusions of law through the same vote, thus making it impossible precisely to determine the moving consideration in the judgment of any given issue.

It has been the general notion that impeachment is an engine too ponderous in action to be of practical value in the economy of government, and this notion has given rise to an unwarranted dread of starting its machinery in motion. But I think that the inertia of the impeaching power in this country may be largely attributable to the well-defined limitations which have been fixed upon the tenure of all civil officers of the United States, save the members of the judiciary, who hold their offices during good behavior. In most cases of official delinquency it has been considered advisable to allow the tenure of executive officers to become determined by expiration of time or through dismissal by the appointive power, rather than to resort to the more drastic process of impeachment. Moreover, the judges, with few exceptions, have so demeaned themselves in the performance of their functions as to command the unqualified respect and confidence of the people. Thus there has been but little demand for the exercise of the power of impeachment and but little occasion for the study of its underlying principles.

* The author of this monograph, Mr. Wrisley Brown, Special Assistant to the Attorney General, conducted the original investigation which resulted in the impeachment of Judge Robert W. Archbald of the United States Commerce Court. Mr. Brown was also designated by resolution of the Managers on the part of the House of Representatives to assist in the trial of the case before the Senate. — ED.

THE LEX PARLIAMENTARIA OF ENGLAND.

The institution of impeachment is essentially a growth deep rooted in the ashes of the past. In common with all our agencies of government it bears the inevitable impress of tradition. It is an extraordinary remedy born of the parliamentary usage of England, and, without sacrificing law to history, we must trace the course of its general development in order clearly to comprehend its reason and philosophy.

The criminal jurisdiction of Parliament had its origin in the general judicial power of the *Aula Regia*, which was established by William the Conqueror. This tribunal was originally composed of the king's officers of state, including the barons of Parliament and justiciars learned in the law. During early Norman times this great tribunal administered the universal justice of the realm. But as the affairs of government and the transactions of men became more diverse and intricate the impracticability of so multifarious a jurisdiction became sensible. In the reign of Edward the First began the disintegration of this catholic organization, which has been more generally known as the *Curia Regis*. The High Court of Chancery, the Court of the King's Bench, the Court of the Exchequer, and the Court of Common Pleas, became separate and distinct judicial bodies. Although jurisdiction over criminal cases generally was vested in the Court of the King's Bench, the barons reserved to Parliament the right of finally reviewing the judgments of all the other courts of judicature. Thus the Parliament remained the high court of the realm in fact as well as in name.

Upon the separation of Parliament into the House of Lords and the House of Commons residuary jurisdiction to review the decisions of other courts survived in the House of Lords, together with the sole power of adjudicating impeachments prosecuted by the Commons.¹ The practice of impeachment, in various irregular

¹ In *Kilbourn v. Thompson*, 103 U. S. 168, 183-184 (1880), referring to the power of the House of Commons to punish for contempts, Justice Miller said: "This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament. They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in

forms, began during the latter part of the reign of Edward the Third, but it was not until the passage of the famous statute of 1 Henry IV, c. 14, that prosecutions of this character became governed by definite rules of procedure.²

All the subjects of England were amenable to impeachment in the Parliament, irrespective of whether or not they held public office. Peers were impeachable for crime of any grade, but, while it is difficult to understand the reason for the distinction, commoners could be impeached only for misdemeanors or offenses not punishable by death.³ Upon conviction, the House of Lords exercised authority to impose any penalty which it considered appropriate to the offense. During the primitive stages of the law, passion oftentimes prevailed over judgment in these proceedings, especially with respect to impeachments for treason against the crown in times of revolutionary stress, and many shocking atrocities were committed under the guise of parliamentary justice.

In theory, the process of impeachment was usually directed against offenses of peculiar injury to the state. The ordinary courts were clothed with jurisdiction of sufficient latitude to try and punish all offenders for violation of the definitive laws, but such courts could not take cognizance of many offenses of a political nature, such as the official misconduct of public officers of rank. It was considered appropriate that high offenders against the state and men of great power and influence should be tried by the Lords, upon the accusation of the Commons, who composed the grand inquest of the nation. Thus the abuse of official trust in its many and varied ramifications was the cardinal vice which formed the

his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England."

² Stephen, *History of the Criminal Law of England*, 156; 1 Anson, *Law and Custom of the Constitution*, 351.

³ Wooddesson's *Lectures on the Law of England*, Lecture XL, 358.

pretext, if not the motive, of most of the well-considered impeachment trials.

Under the *lex parliamentaria* the commission of crime in contravention of the constituted laws, either written or unwritten, was not essential to impeachability.⁴ And, in the very nature of things, it was imperative that this should be the rule and practice of the High Court of Parliament. The internal evils which undermine the polity of a state are too insidious to predetermine; the nefarious workings of political craft are too elusive to classify in advance of their overt manifestation. Indeed, the wisdom of the ages multiplied by eternity would not suffice to devise a system of positive laws that would adequately anticipate the ingenuities of selfish ambition and the machinations of avarice and greed and graft in the administration of the affairs of government. Impeachment was, therefore, an effective remedy which, together with penal acts against particular offenders, was relied upon by the English people to protect the kingdom against the infidelity and accroachments of its ministers through the recurring vicissitudes of turbulent centuries. And during the memorable epoch prelude to the dawn of American independence this especial method of prosecution, though seldom put into application, was still in the flower of its usefulness.

PROVISIONS OF THE FEDERAL CONSTITUTION RELATING TO IMPEACHMENT.

When the constitutional convention of the American colonies assembled to formulate the organic law of the new republic, im-

⁴ "Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution. Thus, if a lord chancellor be guilty of bribery, or of acting grossly contrary to the duty of his office, if the judges mislead their sovereign by unconstitutional opinions, if any other magistrate attempt to subvert the fundamental laws, or introduce arbitrary power, these have been deemed cases adapted to parliamentary inquiry and decision. So, where a lord chancellor has been thought to have put the seal to an ignominious treaty, a lord admiral to neglect the safeguard of the sea, an ambassador to betray his trust, a privy counsellor to propound or support pernicious and dishonourable measures, or a confidential adviser of his sovereign to obtain exorbitant grants or incompatible employments, these imputations have properly occasioned impeachments; because it is apparent how little the ordinary tribunals are calculated to take cognisance of such offences, or to investigate and re-

peachment was an institution which had been tried and seasoned in the ebb and flow of time. The great collection of harmonized political principles born of the deliberations of that convention was a mosaic of compromises. It contained radical departures from the scheme of government prevailing in the mother country, but its creative experiments were few. Some of its provisions pertinent to impeachment were declaratory, or adaptive, of existing law. Others expressed genuine political innovation which has been widely misunderstood. I proceed to group and consider these provisions in their logical sequence and proportion.

Section 2 of Article I provides that:

"The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment."

Section 3 of Article I provides that:

"The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present."

This division of authority was fashioned after the English practice. It requires that the proceeding shall be instituted by the direct representatives of the people, and decision of the cause shall be made by the senators representing the sovereignty of the states. The judgment of the Senate is final, but it can only take cognizance of offenses which are presented by the House of Representatives. The provision that the Chief Justice shall preside over the trial of the President on an impeachment is a device for avoiding the prejudicial effect of a conflict of interest on the part of the Vice-President, or President *pro tempore* of the Senate. It is exceedingly doubtful whether the Chief Justice is entitled to cast a deciding vote when so presiding. The purpose of the arrangement would seem to negative the existence of such a right.

The vote of the majority was sufficient to convict on an impeach-

form the general polity of the state." Wooddesson's Lectures on the Law of England, Lecture XL, 358-359.

The English impeachment cases are well collected in 4 Hatsell's Precedents of Proceedings in the House of Commons, 56 *et seq.*

ment in the House of Lords. But, although ours is essentially a government by majorities, it was thought wise to break the force of faction in the exercise of the impeaching power. Hence it was provided that a concurrence of at least two-thirds of the senators present should be requisite to conviction. This provision imposes a heavy burden upon the prosecution of an impeachment, but experience has vindicated it as a wise restraint in times of popular excitement and tense partisan strife.

Section 4 of Article II provides that:

"The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

This section has been the subject of much controversy. The framers of the Constitution, guided by memories of the oppressions practiced in the past and informed by a strange prescience of the exigencies of the future, limited the application of impeachments to civil officers of the United States. It needs but little reflection to bring one to a realization of the wisdom of this limitation. Provision was made in section 5 of Article I for the expulsion of members of the Senate and House of Representatives by a vote of two-thirds of their colleagues present in these respective bodies. By section 8 of Article I the Congress was granted power to make rules for the government and regulation of the land and naval forces, and in pursuance thereof statutes have been enacted providing for the punishment and dismissal of officers of the army and navy upon the sentence of courts-martial. But the punishment of private citizens for violation of the penal laws was confided wholly to the courts of judicature.

It has been earnestly contended by a highly respected school of legal thought that only indictable offenses are within the contemplation of this provision for impeachment.⁵ Again, it has been asserted by eminent lawyers in the conduct of various impeachment trials that, while indictability may not be the true criterion of impeachability, impeachment under our Constitution presupposes the commission of an offense in contravention of statute or against the

⁵ Probably the best statement of this doctrine is contained in 15 Am. L. Reg. 257. See also minority report of House Judiciary Committee, on the first attempt to impeach President Johnson. (House Report No. 7, 40th Cong., 1st Ses., p. 105.)

precepts of the common law.⁶ Neither of these doctrines is tenable upon principle or upon authority.

The phrase "treason, bribery, or other high crimes and misdemeanors" was taken bodily from the nomenclature of the *lex parliamentaria* of England, where it had acquired a well understood and generally accepted meaning. It is, then, in the nature of a term of art, and by all the recognized canons of construction we must look to its source for light in its interpretation.⁷ By the immemorial usage of Parliament many offenses were impeachable which were not indictable or punishable as crimes at common law. Surely the fathers would not have adopted such a latitudinarian phrase had they intended to narrow its purview and the accustomed range of its application. With the exception of collateral reference to the crime of treason, the Constitution enumerates, but does not define, impeachable offenses. It does not descend to particulars. The removal clause was made designedly indefinite, and it must needs be construed as indefinite if it is to serve the purpose of its being.⁸ By section 3 of Article III the offense of treason was modified by specific definition and its incidents were materially restricted. The offense of bribery had substantially the same characteristics in both the common and the parliamentary law of England, so that it is not difficult to fasten upon the precise sense in which it is here used. It will be noted that these are offenses primarily and peculiarly against the state, as contradistinguished from offenses against the individual. The phrase "high crimes and misdemeanors" was an expression of denotation which had long been a part of the termi-

⁶ This theory is well presented in 16 Am. L. Rev. 798.

⁷ See *United States v. Jones*, 3 Wash. C. C. R. 209, 215 (1813); *Ex parte Hall*, 1 Pick. (Mass.) 261, 262 (1822).

⁸ In the constitutional convention the word "maladministration" was proposed by Colonel Mason, but it was objected to by Mr. Madison as too vague, and the words "high crimes and misdemeanors" were inserted instead. (See 3 Madison's State Papers, p. 1528.) However, on June 17, 1789, when speaking in the House of Representatives with respect to the propriety of giving to the President the right to remove public officers, Mr. Madison said: "The danger, then, consists merely in this: The President can displace from office a man whose merits require that he should be continued in it. What will be the motives which the President can feel for such abuse of his power and the restraints that operate to prevent it? In the first place, he will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."

1 Debates and Proceedings of Congress, 497.

nology of the *lex parlamentaria*, but it was wholly unknown to the municipal law.⁹ It is not susceptible of precise definition. Reduced to its lowest terms, it must still be a generalization as broad as the mischief against which the process of impeachment guards. Therefore, its scope may best be illustrated by analogies.

Fraud is a term which has a well-understood signification in equity jurisprudence. It is characterized by an adaptable elasticity which reaches the multitudinous and diverse manifestations of chicanery that the law is unable to define adequately. Certain general principles control, but each case must stand upon its own bottom. The application of these principles to single instances must, to a large extent, be determined by the wise discretion and trained conscience of the chancellor. So must the discretion and conscience of the Senate determine the issues of an impeachment.

Again, the Articles of War, which have been given the vitality of law in the army and the navy by virtue of statutory adoption, provide that conduct unbecoming an officer and a gentleman shall constitute ground for dismissal from the service.¹⁰ It would be obviously impossible to devise any set rules or standard of conduct sufficiently comprehensive to prescribe the constituent elements of such an offense.

The same insurmountable difficulty must be confronted in any legislative attempt to predetermine and define contempts. Such offenses are breaches of privilege which usually hinge upon circumstance, and from their very nature they will not admit of precise definition. Yet it has been held by the Supreme Court that the House of Representatives and the Senate are clothed with power to punish for contempts in appropriate cases.¹¹

To determine whether or not an act or a course of conduct is

⁹ In a note to 4 Bl. Comm. 5, Christian says: "The word 'crime' has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the words 'high crimes and misdemeanors' are used in prosecutions by impeachment, the words 'high crimes' have no definite signification, but are used merely to give greater solemnity to the charge. When the word 'crime' is used with a reference to moral law, it implies every deviation from moral rectitude."

¹⁰ U. S. Rev. Stat., sec. 1342, art. 61.

¹¹ *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 230 (1821).

sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public propriety and civic morality. The offense must be prejudicial to the public interest and it must flow from a wilful intent or a reckless disregard of duty to justify the invocation of the remedy. It must act directly or by reflected influence react upon the welfare of the state. It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct which, in its natural consequences, tends to bring an office into contempt and disrepute.¹²

While the offense must be committed during incumbency in office, it need not necessarily be committed under color of office.¹³ An act or a course of misbehavior which renders scandalous the

¹² "Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime; nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice in respect of offences against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may exist where no offence against positive law has been committed, as where the individual has, from immorality, or imbecility, or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar, and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer." 1 Curtis, *Constitutional History of the United States*, 481-482. See also 1 Tucker on the Constitution, 419; Cooley, *Principles of Constitutional Law*, 178; Foster on the Constitution, 581 *et seq.*; 1 Story on the Constitution, 5 ed., §§ 796-799; 2 Watson on the Constitution, 1034; Pomeroy, *Constitutional Law*, 9 ed., 600 *et seq.*; Cushing's *Law and Practice of Legislative Assemblies*, 980 *et seq.*; Rawle on the Constitution, p. 209 *et seq.*; 15 Am. & Eng. Encyc. of Law, 2 ed., 1066-1068; 15 Am. L. Reg. 641, 646.

¹³ "It is, of course, primarily directed against official misconduct. Any gross malversation in office, whether or not it is a punishable offense at law, may be made the ground of an impeachment. But the power of impeachment is not restricted to political crimes alone. The Constitution provides that the party convicted upon impeachment shall still remain liable to trial and punishment according to law. From this it is to be inferred that the commission of any crime which is of a grave nature, though it may have nothing to do with the person's official position, except that it shows a character or motives inconsistent with the due administration of his office, would render him liable to impeachment." Black, *Constitutional Law*, 3 ed., 138.

personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions. Such an offense, therefore, may be characterized as a high crime or misdemeanor, although it may not fall within the prohibitory letter of any penal statute. Furthermore, an act which is not intrinsically wrong may constitute an impeachable offense solely because it is committed by a public officer. The official station of the offender may also, to some extent, affect the impeachability of his offense. For example, a judge must be held to a more strict accountability for his conduct than should be required of a marshal of his court, and this discrimination in official responsibility permeates through all the gradations of official rank and authority.

Thus it requires a wide sweep of discretion to deal justly and effectively with political transgressions, and it well accords with the genius of American institutions that such discretion should be proposed in the august body of the Senate.

Section 1 of Article III provides that:

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

By the plain terms of the first clause of this section the judicial power of the United States, and all of it, was granted to courts of judicature. They were clothed, exclusively, with both civil and criminal jurisdiction in the adjudication of legal controversies, and, by the application of a familiar maxim, we must conclude that only such tribunals as were described were intended to perform the judicial function.¹⁴ This underlying fact is highly important to a

¹⁴ In *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 328, 330 (1816), Chief Justice Marshall, referring to this section, said: "Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be

correct understanding of the springs and sources of the impeaching power under our Constitution, and the failure to recognize it has bred endless error.

The second clause contains an assurance of stability in the tenure and emolument of judicial office. This provision is also a derivative of the English law. In the early times the judges held their offices at the pleasure of the king. Such a precarious title was found to be ill suited to the judiciary, and the Parliament, at a rather modern date, divested the crown of its authority in this respect and granted the judges a conditional tenure to have and to hold during good behavior. This contrivance was intended to preclude the dismissal of worthy incumbents of the judicial office without cause, and at the same time reserve to the Parliament the power of removing those who should prove to be unfit for judicial office by breach of the condition of their tenure. For a considerable period of time thereafter impeachment was the only process whereby to oust judges who ill behaved. Then, during the early part of the eighteenth century, Parliament initiated the practice of removing unfit judges from office by simple address, without trial, so that at the time of the adoption of our Constitution both remedies were available.

The tenure of all civil officers of the United States, with the exception of the judges, may be automatically determined by the efflux of time, or through the action of the electorate or the appointive power. But the exercise of the impeaching power is the only available means, save death or resignation, whereby the tenure of the judges may be terminated.

It is an elementary rule of construction that every provision of a written instrument, whether it be a will or a contract or a statute or a constitution, should be given full force and effect if it is possible so to do.¹⁵ It follows that the provision granting the judges tenure

vested) in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish. . . .

"If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative as to one part, is imperative as to all."

See also, *United States v. Klein*, 13 Wall. (U. S.) 128, 147 (1871); *State v. Sullivan*, 50 Fed. 593, 599 (1892); *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, 612 (1889).

¹⁵ Southerland on Statutory Construction, 284-285, 317-321, 412.

to hold during good behavior must be read *in pari materia* with the provision that they shall be removed from office upon impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors. The judicial-tenure clause amplifies the removal clause, which proximately precedes it in the Constitution. Each borrows cogency and light from the other.

It was the policy of our organic law that the judiciary should be reasonably independent in the administration of justice. But it was intended that this independence should be an honest independence in the legitimate use of the judicial power. The fathers did not desire to grant the judges a non-forfeitable life tenure, thereby placing the judiciary wholly beyond the sovereign power of the people. Such an indefeasible tenure, with irrevocable authority, would be highly incompatible with a representative form of government. Therefore, following the English custom, it was provided that the judges should hold their offices during good behavior.

This provision is two-edged; it is both protective and admonitive. So long as the behavior of a judge is good, within the meaning of the Constitution, his tenure is impregnable.¹⁶ This behavior which is enjoined by the Constitution must be understood to be a relative behavior, although it is governed by immutable laws of right and wrong, to which judicial action should conform. The spirit of the decalogue of judicial conduct does not change, but it must be applied to conditions that change with the development of our civilization. Accordingly, the constitutional provision relating to judicial tenure should be construed with reference to the public morality of the time being, and its sense may vary and does vary with the varying ethical standards of successive generations.

Misbehavior is the antithesis of good behavior. Therefore, it is a breach of the condition subsequent upon which the judicial tenure rests. When a judge exercises the power and appropriates the

¹⁶ In the 78th Article of the Federalist, Hamilton alluded to this provision as follows: "The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."

emoluments of an office which he has thus vitiated, he defies the supreme law of the land. If he cannot be ousted until his conduct comes squarely within the teeth of the criminal laws, the constitutional provision fixing judicial tenure is little more than an idle play upon words. The proposition implies a monstrous vacuum in the polity of the nation. A right without a remedy is an anomaly which is violently abhorrent to our system of jurisprudence. Judicial office is essentially a public trust, and the right of the people to revoke this trust is fundamental. The process of impeachment must be their corresponding remedy.¹⁷

Section 2 of Article III provides that:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

It has been the contention of learned advocates that this provision presupposes that impeachable offenses are offenses against the criminal laws. But the courts have repeatedly held that there is no common law of the United States, and if this contention were sound it would follow that the process of impeachment can only lie against acts which have been denounced as crimes by federal statute. The fallacy of the position becomes apparent when we consider that the statute books were silent with respect to crimes for a considerable length of time after the organic law became operative, and if statutory enactment were the test the impeaching power would have been locked in absolute abeyance during that period. Such a result would certainly not fall within

¹⁷ "A civil officer may so behave himself in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute, do with the constitutional provision relative to judges which says, 'Judges, both of the supreme and inferior courts, shall hold their offices during good behavior'? This means that as long as they behave themselves their tenure of office is fixed, and they cannot be disturbed. But suppose they cease to behave themselves? When the Constitution says, 'A judge shall hold his office during good behavior,' it means that he shall not hold it when it ceases to be good." 2 Watson on the Constitution, 1036. See also Foster on the Constitution, 586; 1 Tucker on the Constitution, 418, 419; The Federalist, Art. 79.

the fair intendment of the Constitution. It seems, rather, that this provision serves more sharply to differentiate the offenses to which impeachment is appropriate from offenses against the criminal laws.

Section 3 of Article I further provides that:

“Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.”

This section very materially changed what may be called the dynamics of impeachment. We have seen that from time immemorial Parliament has possessed judicial power, and sometimes wielded it all too freely, to deprive the subjects of England of their property, their liberty, and even their lives. But, by plenary grant, the wisdom of our fathers entrusted the judicial power of the United States to bodies judicial. The basic scheme of coördination tends strongly to negative the existence of an intent to clothe an essentially political body with an overlapping criminal jurisdiction. And, when properly construed, the constitutional provisions bearing on impeachments raise no conflicting implication.

In a true republic no man can be born with a right to public office. Under such a system of government, office, whether elective or appointive, is in its essence a political privilege. The grant of this privilege flows from the political power of the people, and so, ultimately, must it be taken away by the exercise of the political power resident in the people.

Let us mark the contrast by reasoning from the concrete. When the President nominates a candidate for a federal judgeship he exercises the political power. When the Senate confirms the nomination it exercises the political power. When the House of Representatives impeaches a judge who has thus acquired his commission the political power is again brought into play. Upon conviction of the impeachment, the respondent is removed from office. Perhaps he may be perpetually disqualified to hold any office of honor, trust, or profit under the United States. But here the province of the political power, operating through the medium of impeachment, ceases. Its function has been performed and its force is spent. It

has worked a deprivation of political privilege and political capacity, but it has not and could not have taken away a civil right. Divested of his authority for wholly political reasons, the respondent is still subject to condign punishment in the courts of ordinary jurisdiction for the commission of crime against the laws of general application. Thus an impeachment in this country, though judicial in external form and ceremony, is political in spirit. It is directed against a political offense. It culminates in a political judgment. It imposes a political forfeiture. In every sense, save that of administration, it is a political remedy, for the suppression of a political evil, with wholly political consequences.

This results in no confusion of the political and the judicial powers. The line of demarcation is clearly discernible, even through the labyrinth of formal non-essentials under which ingenious counsel in various cases have sought to bury it. The judgment of the High Court of Parliament upon conviction of an impeachment automatically works a forfeiture of political capacity; but this is simply an effect of the judgment, which is to be distinguished from the judgment itself. So, under our system of laws, loss of political capacity is an effect of the sentence pronounced by the courts of criminal jurisdiction upon a conviction of felony. Such judgments are inherently judicial in their nature. The judgment of the Senate on an impeachment, however, must be addressed directly and solely to the political privilege and the political capacity of those who, of their own volition, have submitted to its jurisdiction by the acceptance of public office. In no proper sense is such a judgment a sanction of retributive justice. It is remedial, but not vindictive. The safeguard of the state is its principal object, and the punishment of the individual is left exclusively to the courts of judicature. It is a disciplinary rather than a penal measure.

Section 2 of Article II provides that :

- "The President . . . shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

Under the *lex parlamentaria* a pardon from the King was not pleadable in bar to an impeachment, nor could it affect the consequence of attainder flowing from conviction upon an impeachment.

However, the King could, by the exercise of the pardoning power, suspend or remit the execution of a criminal sentence imposed by the Lords in the adjudication of an impeachment.¹⁸

Inasmuch as the Senate was not vested with power to impose a criminal sentence, this exception of impeachment from the pardoning power made no substantial modification of the law which had theretofore prevailed in England. It is obvious that if the President could grant pardons in cases of impeachment, he might, under conceivable conditions, restore to office those who had been deposed by the judgment of the Senate upon conviction of impeachment. The plan and purpose of the remedy would thus be utterly defeated.

THE AMERICAN CASES.

There have been nine impeachments under the federal Constitution, and of these six have been aimed at the judiciary. The impeachments which did not apply to the judges, while historically interesting, throw but faint light upon the subject here presented, and for this reason I have confined their treatment to a brief statement in the appended notes.¹⁹

¹⁸ 1 Stephen, *History of the Criminal Law of England*, 146; Wooddesson's *Lectures on the Law of England*, Lecture XL, 367.

¹⁹ William Blount, United States senator from Tennessee, was impeached in 1797 on five articles, charging conspiracy to promote within the jurisdiction of the United States a hostile military expedition against the dominions of Spain in the Floridas and Louisiana for the purpose of conquering such territory for Great Britain, with which Spain was then at war; conspiracy to incite certain Indian tribes to commence hostilities against the subjects of Spain, in violation of treaty provisions; conspiracy to alienate the confidence of such Indians from the official agent of the United States appointed to reside among them; conspiracy to seduce the official interpreter of the United States appointed to reside among said tribes from the duty of his commission; and conspiracy to foment disaffection among certain Indian tribes toward the United States. Respondent was expelled by the Senate shortly after his impeachment by the House of Representatives. He filed two pleas to the jurisdiction, first, on the ground that a senator of the United States is not a civil officer of the United States subject to impeachment, and, second, that by expulsion he had ceased to be a senator. The Senate sustained the first plea and dismissed the impeachment for want of jurisdiction. (3 Hinds' *Precedents of the House of Representatives*, 644.)

Andrew Johnson, President of the United States, was impeached in 1868 on eleven articles charging the removal of E. M. Stanton, Secretary of War, in violation of a statute known as the Tenure of Office Act; attempting to induce a general officer of the army to violate the provisions of this statute; and attempting to bring into contempt the Congress of the United States by making inflammatory and

The first impeachment of a federal judge, and the first impeachment which was successful, was that of John Pickering, Judge of the United States District Court for the District of New Hampshire. In 1803 the House of Representatives impeached Judge Pickering on four articles. The first three articles charged that the respondent had acted in wilful contravention of a statute of the United States in the course of a suit brought by the government to condemn a ship and its cargo under the custom laws. It was specifically alleged that he wrongfully delivered this ship to the claimant after its attachment without requiring the prescribed bond of indemnity; that he wrongfully refused to hear the testimony which was offered in behalf of the government; and that he wrongfully refused to grant an appeal to the government from his arbitrary decree in final adjudication of the cause. The fourth article charged that upon a certain occasion the respondent had attempted to perform his judicial duties upon the bench in a state of total intoxication, and that upon such occasion he had publicly used the name of the Supreme Being in a profane and indecent manner. No answer was filed by the respondent, and he made no appearance either in person or by attorney. In pursuance of petition, however, Judge Pickering's son was allowed to adduce evidence tending to show that his father was mentally irresponsible. It appeared from the proof that if insanity existed to any extent, which was doubtful, it was due to habitual intemperance. The Senate convicted the respondent on each of the articles, and he

highly abusive speeches. The respondent was acquitted by a margin of one vote on the second, third, and eleventh articles, whereupon the Senate adjourned *sine die* without voting upon the remaining articles, and the Chief Justice, who presided at the trial, directed that a verdict of acquittal be entered of record with respect to them. (3 Hinds' Precedents of the House of Representatives, 844.)

William W. Belknap was impeached in 1876 on five articles charging the acceptance of a portion of the profits of an army post tradership from a post trader whom he had appointed. A short while before the House impeached him, Secretary Belknap resigned and his resignation was accepted by the President. He pleaded to the jurisdiction of the Senate on the ground that he was not a civil officer of the United States at the time of his impeachment. The plea was overruled by a majority of less than two-thirds of the senators voting and the trial proceeded in due course. The respondent was acquitted by virtue of the votes of senators who had voted in favor of the plea to the jurisdiction. The case is supposed to have established the proposition that a private citizen cannot be impeached for offenses committed during previous tenure of public office, although he has admittedly resigned to escape impeachment. (3 Hinds' Precedents of the House of Representatives, 902.)

was removed from office, but the judgment did not impose a disqualification to hold any office of honor, trust, or profit under the United States.²⁰

On March 12, 1804, the same day that Judge Pickering was convicted, Samuel Chase, Associate Justice of the Supreme Court of the United States, was impeached on eight articles, charging certain misconduct to the prejudice of impartial justice in the course of a trial on an indictment for breach of the sedition laws; misconduct in improperly inducing or coercing a grand jury to return an indictment against an editor of a newspaper for alleged breach of the sedition laws, and misconduct in addressing an inflammatory political harangue to a grand jury. An elaborate defense was made by the respondent. The trial resulted in a failure of the impeachment from want of a concurrence of two-thirds of the senators present, although a majority of the votes were cast for conviction on several of the articles.²¹

James H. Peck, Judge of the United States District Court for the District of Missouri, was impeached in 1830 on one general article, containing eighteen specifications, charging abuse of official power and arbitrary conduct in severely punishing for contempt of court an attorney who had published a criticism of one of the respondent's decisions. In his answer the respondent averred that he was legally clothed with the authority which he had exercised, or that he was justified in assuming that he had such authority, and denied the existence of malicious motive. The trial resulted in a majority of votes against the impeachment.²²

In 1862, when the spasm of the times threatened the perpetuity of the Union, the House of Representatives impeached West H. Humphries, Judge of the United States District Court for the District of Tennessee. Seven articles were adopted, charging the making of a public speech inciting revolt and rebellion against the United States; support and advocacy of the ordinance of secession; aiding and abetting an armed rebellion against the United States; conspiring to oppose the authority of the United States by force and arms; refusing to perform the functions of his office; and wrongfully causing arrests and confiscations as a judge of the Confederate

²⁰ 3 Hinds' Precedents of the House of Representatives, 681.

²¹ 3 Hinds' Precedents of the House of Representatives, 711.

²² 3 Hinds' Precedents of the House of Representatives, 772.

States. The respondent filed no answer to these articles and made no appearance. The trial proceeded in his absence, and he was convicted on all the charges, with the exception of the second specification of the sixth article, which alleged wrongful confiscation of property of citizens of the United States to the use of the Confederacy. By the judgment of the Senate, upon a unanimous vote, the respondent was removed from office and branded with perpetual disqualification to hold any office of honor, trust, or profit under the United States.²³

The next impeachment affecting the judiciary was that of Charles Swayne, Judge of the United States District Court for the District of Florida. In 1904, this judge was impeached on twelve articles, charging that he had rendered false claims against the government of the United States in his expense accounts; that he had appropriated to his own use, without making compensation therefor, a certain railroad car belonging to a defunct railroad company then in the hands of a receiver appointed by the respondent; that he had resided outside of his judicial district in violation of statute; and that he had maliciously adjudged certain parties to be in contempt of his court and had imposed excessive punishments upon them. The respondent defended, and the trial resulted in a majority of votes against conviction.²⁴

In 1912 the House of Representatives impeached Robert W. Archbald, United States Circuit Judge, designated a member of the Commerce Court. This case presents the only satisfactory test of the remedy of impeachment as applied to the judiciary, and for that reason it requires a somewhat particular review of its most salient features. There were thirteen articles exhibited against Judge Archbald. The first six articles, with the exception of article four, charged the respondent with the use of his official power and influence to secure business favors and concessions, in transactions relating to coal properties, from railroad companies and their subsidiaries having litigation before the Commerce Court. Article four charged secret correspondence between the respondent and counsel for a railroad company regarding the merits of a case then pending before the Commerce Court. Articles seven to twelve, inclusive, charged misconduct as a United States district judge,

²³ 3 Hinds' Precedents of the House of Representatives, 805.

²⁴ 3 Hinds' Precedents of the House of Representatives, 948.

which office the respondent held immediately prior to his appointment as circuit judge. These charges related to the alleged use of his official influence to secure credit and other favors from parties having litigation in the court over which he presided; the acceptance of a purse from certain members of the bar of his court; a trip abroad at the expense of a magnate of large corporate interests; and the designation of a general railroad attorney to be jury commissioner. Article thirteen was in the nature of a blanket count, charging a general course of misconduct which embodied all the various acts alleged in the other articles.²⁵

The answer interposed by the respondent consisted of demurrers to all the articles, which were coupled with a plea in the nature of a special traverse to each of the articles with the exception of the sixth and the thirteenth. The pleas and the answer admitted most of the primary facts alleged, but denied the existence of wrongful intent.²⁶ The replication filed by the managers on the part of the House of Representatives reiterated the sufficiency of the articles in law and in fact.²⁷

Counsel for the respondent challenged the jurisdiction of the Senate to consider the offenses alleged in articles seven to twelve, inclusive, on the ground that they were committed, if at all, prior to his appointment as circuit judge. It was also argued at great length that the acts charged in the articles, and established by the evidence, did not constitute impeachable offenses.

The respondent was ably defended, but the trial resulted in his conviction by an overwhelming vote on the first, third, fourth, fifth, and thirteenth articles.²⁸ By the judgment of the Senate he was removed from office and disqualified to hold any office of honor, trust, or profit under the United States. For the first time in any impeachment case under the federal Constitution this perpetual disqualification was imposed by a vote of less than two-thirds of the senators present.

It seems fair to conclude from the vote on the thirteenth article that judges are impeachable for a general course of misbehavior embracing a series of acts that are subversive of judicial probity

²⁵ 48 Congressional Record, 9051.

²⁶ 48 Congressional Record, 9795.

²⁷ 48 Congressional Record, 9983.

²⁸ 49 Congressional Record, 1439.

or propriety chiefly because of the persistency with which they are committed. This is not to be understood as a holding that many legal naughts may, collectively, become a legal unit, but, rather, that a continuation of transactions which are not seriously irregular when standing alone may become component elements of a system of misconduct sufficient to support an impeachment.

All the articles charging offenses which were committed while the respondent held the office of United States District Judge failed of conviction. The considerations which brought about this result can only be surmised, but it is likely that it was due to a cautious disinclination on the part of the Senate to establish the precedent that a civil officer may be impeached for offenses committed in an office other than that which he holds at the time of his impeachment. Such a doctrine would probably be vicious in principle, for, if carried to an extreme, it might well develop an actual case of relentless vengeance suggesting the immortal story of Jean Valjean.

The impeachments that have failed of conviction are of little value as precedents because of their close intermixture of fact and law, which makes it practically impossible to determine whether the evidence was considered insufficient to support the allegations of the articles, or whether the acts alleged were adjudged insufficient in law to constitute impeachable offenses. The action of the House of Representatives in adopting articles of impeachment in these cases has little legal significance, and the deductions which have been drawn from them are too conjectural to carry much persuasive force. Neither of the successful impeachments prior to the case of Judge Archbald was defended, and they are not entitled to great weight as authorities. In the case of Judge Pickering, the first three articles charged violations of statutory law, although such violations were not indictable. Article four charged open and notorious drunkenness and public blasphemy, which would probably have been punishable as misdemeanors at common law. In the case of Judge Humphreys, articles three and four charged treason against the United States. The offense charged in articles one and two probably amounted to treason, inasmuch as the ordinance of secession of South Carolina had been passed prior to the alleged secessionary speeches of the respondent, and the offenses charged in articles five to seven, inclusive, savored strongly of treason. But it will

be observed that none of the articles exhibited against Judge Archbald charged an indictable offense or even a violation of positive law. Indeed, most of the specific acts proved in evidence were not intrinsically wrong, and would have been blameless if committed by a private citizen. The case rested on the alleged attempt of the respondent to commercialize his potentiality as a judge, but the facts would not have been sufficient to support a prosecution for bribery. Therefore, the judgment of the Senate in this case has forever removed from the domain of controversy the proposition that the judges are only impeachable for the commission of crimes or misdemeanors against the laws of general application. The case is constructive and it will go down in the annals of the Congress as a great landmark of the law.

THE EFFICIENCY OF IMPEACHMENT.

In the final analysis, the efficiency of such a remedy must be measured by the ratio of its direct and indirect results to the cumulative demand of the public interest. I have endeavored to review, as briefly as may be, the direct results of the process of impeachment in its application to the federal judiciary. Its indirect results permeate the whole operation of our law.

We are working by normal progress and by normal means toward the realization of a more complete justice in the affairs of men. But we must look to human judges for the administration of our human laws. In the complex mutations of politics, it is inevitable that some unworthy men shall attain the bench. Those who fail to keep inviolate this most sacred of temporal trusts are a living menace to the majesty of the law, because they inspire contempt for the law. The national welfare requires decisive revocation of their power. Political impeachment is the remedy provided by the Constitution, and, actually as well as potentially, it is an adequate remedy. In its adoption the fathers renounced the fanaticism of precedent as well as the fanaticism of experiment, and our legal history has vindicated their vision and discernment.

The record of the federal judiciary has been remarkably free of infidelity to duty. The personal character and official conduct of its members have been, in the main, above suspicion or reproach, but undoubtedly many unknown and unknowable instances have

occurred in which a wholesome fear of impeachment has prevented abuse of judicial power and breach of judicial obligation. This deterrent effect of the remedy has been little appreciated, but the lack of it would have been most seriously felt.

The impeachment prescribed by our Constitution weighs well the evil to be redressed and adjusts the ordained relief to the occasion. It is the expression of the sober will rather than the restive whim of the people. It restrains judicial tyranny without overawing the authority of the courts. It regulates the conduct of the judges without disturbing the poise and balance of their judgments. It strikes directly at the judicial fault without destroying the judicial independence that is essential to the preservation of our constitutional jurisprudence. This great body of fundamental law must be maintained intact. It absorbs the changing needs of changing times yet does not change. Upon it the stability and the integrity of our institutions rest. Upon it our civil liberties depend. And without it our republican government could not long endure.

Wrisley Brown.

WASHINGTON, D. C.

ELECTION OF REMEDIES, A CRITICISM.

WE have been told that underlying every rule of the common law is a principle. To interpret and apply the rule properly to a given state of facts it is necessary to understand the principle upon which the rule is founded. It is seldom that there is any conflict among the courts as to the principle upon which any particular rule of law is based; the usual conflict in decisions arises not from a conscious difference of opinion as to underlying principles, but from a neglect to examine into the principle and use it as an aid in applying the rule. When, however, we find courts taking pains to inquire into the principle underlying a given rule and arriving at different conclusions as to the principle upon which the rule is founded, a conflict of decisions in the application of the rule is inevitable. Differences of opinion as to the reason for a rule of law suggest an inquiry as to whether such rule has any sound basis in principle, and when such an inquiry discloses that the alleged principle upon which the rule is most generally conceded to rest is in conflict with other established rules or principles of the common law, and that the operation of the rule is harsh, and frequently results in injustice, it is justifiable to question the validity of the rule itself.

It is submitted that the common rule of law as to election of remedies is thus open to challenge. Characteristic statements of the rule are as follows:

"An election once made with knowledge of the facts between co-existing remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon any remedial right inconsistent with that asserted by the election."¹

"The commencement of an action upon one theory constitutes an election."²

¹ *Stewart v. Salisbury Realty & Ins. Co.*, 74 S. E. 736 (N. C., 1912).

² *McLaughlin v. Austin*, 104 Mich. 489, 491, 62 N. W. 719 (1895); *Frisch v. Wells*, 200 Mass. 430, 431, 86 N. E. 776, 777 (1909); *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890).

Before examining the accuracy of this broad assertion, it should be pointed out that a great majority of the cases disposed of by the application of this rule would have been disposed of in exactly the same way by the application of other established rules of the common law, particularly those relating to estoppel, waiver, and ratification.³ It is the comparatively small class of cases, the decision of which depends solely upon the strict application of the rule of election, that gives rise to this criticism. Let us now see if the indictment can be made good.

First. Courts differ as to the principles upon which the rule of election of remedies depends.

Some courts apparently consider that the rule depends upon the same principles as the doctrine of estoppel, that "the word 'election' as applied to remedies is but another term for estoppel."⁴ No complaint can be made of the application of the rule by courts taking this view. On the other hand, such interpretation of the rule robs it of vitality and deprives it of all excuse for existence as a separate and distinct doctrine of the law. Decisions in such jurisdictions are governed by the principles of estoppel, and the same result would be reached without reference to any special rule as to election of remedies.

A large number of decisions, however, apply the rule to cases in which there is no element of estoppel *in pais*. The principle of the rule, so far as it can be gathered from these decisions, is that public policy demands that a suitor shall not experiment with the remedies which the law affords, that to permit a suitor to commence an action on one theory and later to dismiss that action and commence a new one on a different theory imposes a useless and unnecessary burden on the courts.⁵

The term "election" is often applied to the well-established

³ For example, the leading federal case on election of remedies, *Robb v. Vos*, 155 U. S. 13 (1894) could have been decided by applying ordinary rules of estoppel and ratification.

⁴ *First National Bank v. Commission Co.*, 198 Ill. 232, 64 N. E. 1097 (1902); *Johnson-Brinkman Commission Co. v. M. P. Ry.*, 126 Mo. 344, 28 S. W. 870 (1894); *Bolton Mines Co. v. Stokes*, 82 Md. 50, 33 Atl. 491 (1895). See Bigelow on Estoppel, 3 ed., 562; 19 Yale L. J. 239.

⁵ *Stewart v. Salisbury Realty & Ins. Co.*, 74 S. E. 736 (N. C., 1912); *O'Bryan v. Glenn*, 91 Tenn. 106, 17 S. W. 1030 (1892); *Thompson v. Howard*, 31 Mich. 309 (1875); *Connihan v. Thompson*, 111 Mass. 270 (1873); *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890). See 6 Cyc. 297.

doctrine that one cannot claim under a will or deed and also in opposition to it. This doctrine is distinct from the doctrine of election between remedial rights. In a case of the former class the Supreme Court of the United States uses the following language:

"The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where inconsistent or alternative rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so in other words that one cannot take a benefit under an instrument and then repudiate it."⁶

If the doctrine of election of remedies is an outgrowth of this doctrine of election, it is evident that the basic principle referred to has been forgotten. The rule is constantly applied in favor of defendants who have been guilty of inequitable conduct against plaintiffs who have been guilty of none.

Second. The operation of the rule is harsh.

If the rule as to the binding effect of an election were only applied in cases where there was in fact a trifling with justice — a dismissal of one action and the commencement of a new one without any reason or excuse therefor — the rule would be less open to criticism. But it recognizes no such exceptions. Its operation may be illustrated by a concrete case. One who has been induced by fraudulent misrepresentation to invest most of his capital in the purchase of mining stocks, on learning of the fraud tenders back the stock and commences an action at law for money had and received or in equity for rescission of the contract of sale and the recovery of the purchase money. He acts with full knowledge of the existing facts, and chooses the remedy which will most effectually remedy the wrong by restoring to him all that he parted with. The defendant denies the fraud or alleges that the plaintiff in fact learned the facts long ago and has been guilty of laches in seeking rescission. Issues of fact are raised which make certain a long and costly litigation. Thereafter the plaintiff, having most of his funds invested in the property which he was induced to purchase by the defendant's fraud, loses the balance of his property and becomes destitute. He therefore sells the mining stock for the best price obtainable

⁶ *Peters v. Bain*, 133 U. S. 670, 695, 10 Sup. Ct. 354 (1890).

and begins an action of deceit against the defendant to recover damages for the fraud. The defendant pleads that the plaintiff had two inconsistent remedies, one to rescind the contract, the other to affirm the contract and sue for damages for the fraud; that his tender of the property and commencement of suit for rescission for money had and received operated as a binding operation to rescind. Under the rule as generally stated and frequently enforced, the plea must be sustained.⁷ On the facts stated it is the commencement of the action, not the sale of the stock by the defrauded party, that bars the subsequent action for damages.⁸

The rule always operates in favor of the party who has committed a wrong and against the party originally entitled to redress. As applied by some courts one of several joint tortfeasors may plead in bar to an action for damages for conversion, a prior suit on implied contract against another of the joint tortfeasors. Such a result is a plain sacrifice of justice for the sake of theoretical consistency.⁹ By the application of the doctrine of election an exactly opposite effect is thus given to the commencement of actions theoretically different but practically almost identical in purpose and result. So far as any actual intent on the part of the plaintiff to pass title to the wrongdoer is concerned an action of trover for the recovery of the value of property as damages for conversion is similar to an action of implied contract for the value of the property. Both actions assume that the tangible property itself has gone from the plaintiff forever. The action of trover is based on a disaffirmance of a contract, but its object is the recovery not of the property but of its entire value. Title does not pass to the wrongdoer as a result of such an action until judgment according to the early English decisions,¹⁰ and until judgment and satisfaction according to modern authorities.¹¹ On the other hand the mere commencement of an action of implied contract for the

⁷ *Stewart v. Salisbury Realty & Ins. Co.*, 74 S. E. 736 (N. C., 1912); *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890); *Droege v. Ahrens Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747 (1900).

⁸ *Clark v. Morgan County Nat. Bank*, 196 Fed. 709 (1912).

⁹ *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890). Cf. *Hitchin v. Campbell*, 2 W. Bl. 827 (1771); *Fireman's Ins. Co. v. Cochran*, 27 Ala. 228, 236 (1855); *Marsh v. Pier*, 4 Rawle (Pa.) 273, 285 (1833).

¹⁰ *Buckland v. Johnson*, 15 C. B. 145 (1854).

¹¹ 28 Am. & Eng. Encyc. of Law, 738.

value of property wrongfully converted by the defendant, although equally in disaffirmance of any actual express contract between the parties, is held by Mr. Justice Peckham to pass title at once to the defendant so as to bar subsequent suits for damages against joint tortfeasors not parties to the first action.¹²

Third. The alleged principle upon which the rule, as generally stated and applied, must rest is not consistent with other rules of law.

If public policy, to prevent trifling with justice, forbids a suitor who has two remedies to dismiss a suit for one and resort to the other, notwithstanding the fact that no action has been taken by other persons in reliance on the suit first commenced, the same public policy should require a suitor who has one remedy, and who commences an action therefor, to prosecute that action to a conclusion or be forever barred; yet the law permits one to dismiss an action without prejudice and recommence a similar action.

Furthermore, the rule as to election of remedies does not apply unless the plaintiff actually has two inconsistent remedies;¹³ but if we assume the principle underlying the rule to be that the time of the courts shall not be taken up with different suits against the same defendant based on the same state of facts, the plaintiff should be required in all cases to elect at his peril between inconsistent theories. It cannot be denied that a defendant suffers more by being compelled to defend successive suits prosecuted to final judgment by a plaintiff who in fact had but one available remedy, than he does by being sued twice by a plaintiff who had two available remedies but who abandoned one suit immediately after its commencement. More time of the courts, also, is wasted by the first suitor than by the second.

Fourth. Decisions applying the rule are in conflict in many respects.

Many cases hold that the mere commencement of an action with full knowledge of the facts operates as a final election;¹⁴ others, as pointed out above, refuse to consider the mere commence-

¹² *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890); *Smith v. Baker*, L. R. 8 C. P. 350 (1873) *semble*.

¹³ *Clark v. Heath*, 101 Me. 530, 64 Atl. 913 (1906); *Barnsdall v. Waltemeyer*, 142 Fed. 415 (1905).

¹⁴ See 15 Cyc. 259; 7 Encyc. of Pl. and Pr. 368. See also note 2, *supra*.

ment of an action as an election unless there is some element of estoppel *in pais*.¹⁵ The decisions in the former class of cases are more consistent with the rule as generally stated, but the results reached are much less satisfactory from the standpoint of justice. It seems that even those courts which refuse to consider estoppel as a necessary element in election might properly recognize a distinction between the effect of the mere commencement of actions to rescind and actions based on affirmance. The affirmance of a contract voidable by A. for the fraud of B. is a unilateral act. B. has no option. When A., with knowledge of the facts which may entitle him to rescind the contract, ratifies and confirms it by any action which clearly indicates his intention, the binding force of the contract and the status of the property which is the subject of the contract are determined. No judgment of a court is necessary. On the other hand complete rescission except by the actual final decree of a court is practically a bilateral act. Theoretically it may be unilateral, but practically the status of the property is left in doubt unless the other party to the contract acquiesces in the rescission. A. may tender back property to B., but if B. does not accept it, it can never be determined whether A. is entitled to rescission until a court has decided in an equitable action for rescission, or in a suit at law based on rescission by act of the parties, that on all the facts the plaintiff is entitled to rescission. Whether there has been fraud, and if so whether the plaintiff can put the defendant *in statu quo*, whether he has lost the right of rescission by laches, and the like, are among the many questions which always arise when the party claiming fraud seeks to exercise the right of rescission. A suit on the contract or for damages for its breach is in itself a complete affirmation. A suit for rescission, on the other hand, is for all practical purposes a mere attempt to rescind. With-

¹⁵ *Gibbs v. Jones*, 46 Ill. 319 (1868); *Mulcahy v. Dieudonne*, 103 Minn. 352, 115 N. W. 636 (1908); *Stier v. Harms*, 154 Ill. 476, 40 N. E. 296 (1895); *Bolton Mines Co. v. Stokes*, 82 Md. 50, 33 Atl. 491 (1895); *Hyde v. Kiehl*, 183 Pa. St. 414, 38 Atl. 998 (1898); *Miller v. Hyde*, 161 Mass. 472, 37 N. E. 760 (1894). Cf. *Miller v. Hyde*, 161 Mass. 472, 482, 37 N. E. 760, 763 (1894); *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775 (1909). See 21 Encyc. of Pl. and Pr. 1030. See also *Houston Mercantile Co. v. Powell*, 72 N. Y. Misc. 358, 130 N. Y. Supp. 274 (1911), holding that commencement of an action in equity for rescission is not a binding election but (*obiter*) that the commencement of an action at law for money had and received based on attempted rescission by act of the party would have been a conclusive election.

out clearly recognizing the ground for the distinction above suggested, the Supreme Court of Indiana recognizes that there is such distinction, and holds that the commencement of an action for damages for fraud is a conclusive election to affirm, while the commencement of an action of rescission is not a conclusive election.¹⁶ On the other hand the Supreme Court of North Carolina in a decision rendered last year¹⁷ held that a mere notice of rescission constitutes a binding election, preventing the plaintiff from recovering damages other than such special damages as are consistent with rescission and recoverable even if rescission is completed.¹⁸ The Supreme Court of Michigan, while apparently opposed to the Indiana doctrine,¹⁹ is also in conflict with the North Carolina court, having held that a mere tender of property and demand for rescission does not constitute a binding election.²⁰

The authorities are in conflict also on the question of the right of joint tortfeasors to plead election by the commencement of a prior action against one. In a case already referred to²¹ the Court of Appeals of New York held that the mere commencement of an action on the implied contract against one tortfeasor operated to pass the title to the property and constituted a bar to a subsequent action for damages against a joint wrongdoer. This decision is contrary to a decision of the Superior Court of New York in another case,²² and is contrary to a decision of the Supreme Court of Tennessee.²³ The latter court says:

"If the action be in contract it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for conversion' and a suing for the value of the property: *Kirkman v. Phillips*, 7 Heisk. 224. It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoers unimpaired until he has obtained legal satisfaction. If it were otherwise the suing of any

¹⁶ *Cohoon v. Fisher*, 146 Ind. 583, 45 N. E. 787 (1897).

¹⁷ *Stewart v. Salisbury Realty & Ins. Co.*, 74 S. E. 736 (N. C. 1912).

¹⁸ 14 Am. & Eng. Encyc. of Law, 170; *Warren v. Cole*, 15 Mich. 265 (1867).

¹⁹ *McLaughlin v. Austin*, 104 Mich. 491, 62 N. W. 719 (1895).

²⁰ *Glover v. Radford*, 120 Mich. 542, 79 N. W. 803 (1899).

²¹ *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272 (1890).

²² *Cohn v. Goldman*, 43 N. Y. Super. Ct. 436 (1878). Cf. also *Hitchin v. Campbell*, 2 W. Bl. *827 (1772).

²³ *Huffman v. Hughlett*, 11 Lea (Tenn.) 549, 554 (1883).

one of a series of tortfeasors, even the last, on the implied promise where there was clearly no contract would give him good title and release all the others."

A recent decision in Illinois goes even further:

"There is nothing inconsistent between tort and assumpsit where the value of the property is sought to be recovered. Consequently the doctrine of election has no application."²⁴

Another important case opposed to the New York decision is *Nash v. Minnesota Title Insurance & Trust Co.*²⁵ In this case the plaintiff pleaded that he had elected to rescind and had tendered back the property to the vendor. The court held that he had the right to rescind, but that since he had not received satisfaction as a result of the rescission his remedy by an action for damages against the other parties to the fraud remained in force unaffected by the previous rescission.

"In rescinding a contract and in enforcing rights growing out of such rescission one would expect to look only to the other party to the contract. The nature and effect of rescission are such that they can have no consequence except as against the other party to the contract. . . . We do not think the plaintiffs' rescission of the contract on account of the fraud defeats their right to recover these damages from a third party so long as they have failed to obtain satisfaction for their injuries."²⁶

The authorities are in conflict also upon the question whether an election can be made by acts, not amounting to an estoppel *in pais*, other than the commencement of suit.²⁷

Fifth. The rule is cumbersome in operation, frequently throwing upon the court the burden of trying in one action the question whether the plaintiff would have succeeded in another.

We have already seen that it is established by overwhelming

²⁴ *Edwards, Trustee v. Schillinger Brothers Co.*, 153 Ill. App. 219, 223 (1910).

²⁵ 163 Mass. 574, 40 N. E. 1039 (1895). See also *Kuechle v. Springer*, 145 Ill. App. 127 (1908); 9 HARV. L. REV. 214.

²⁶ At p. 582.

²⁷ *Stewart v. Salisbury Realty & Ins. Co.*, 74 S. E. 736 (N. C., 1912); *Droege v. Ahrens Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747 (1900); *Nash v. Minnesota Title Ins. Co.*, 163 Mass. 574, 582, 40 N. E. 1039, 1041 (1895); *Glover v. Radford*, 120 Mich. 542, 79 N. W. 803 (1899); *Brooks v. Romano*, 149 Ala. 301; 42 So. 819 (1907); *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32 (1909); *Rodermund v. Clark*, 46 N. Y. 354 (1871). Cf. 15 Cyc. 260.

authority that if the plaintiff has not in fact two remedies available the rule as to election of remedies is not applicable.²⁸ To take the concrete instance above referred to, if the defrauded plaintiff has not the right of rescission there is no election by commencing an unsuccessful action for rescission. If the plaintiff was not entitled to rescission in the first suit the second action for damages may be maintained. No difficulty arises in cases where the first suit has been prosecuted to termination; but when the first action has been dismissed the question whether the plaintiff could have won the prior action must be completely tried in the second, and after all the issues raised in the first suit have been tried in the second, if it is found that the first suit could not have been maintained, the issues raised in the second suit must then be tried. The absurdity of such a result is apparent. In the case of *Moller v. Tuska*²⁹ the prior suits were still pending, and on plea of election filed in the second suit the court met the difficulty by staying proceedings in the second suit until the determination of the first. In the case of *Johnson-Brinkman Commission Co. v. Missouri Pacific Ry. Co.*³⁰ the difficulty we have suggested was squarely presented and discussed, as follows:

"The question then arises how was it or by whom was it to be determined that the plaintiff herein mistook his remedy in bringing the attachment suit. It will not be contended, we presume, that after it had been instituted and although plaintiff's attorney had become fully satisfied that the action had been improvidently brought, yet it was necessary in order to save to his client the right to sue in replevin that he should at his expense prosecute the case to final judgment in order to settle that question. Nor do we for one moment suppose that that issue could be tried in this controversy."

If the issue in the first case is not tried in the second we submit that the only proper alternative would be to stay proceedings in the second action until the first could be recommenced and tried to a conclusion. In the case last cited the court evaded the difficulty by holding that there was no election by the first action because there were no circumstances of estoppel.

Sixth. The rule that one must choose at his peril between any

²⁸ See note 13, *supra*.

²⁹ 87 N. Y. 166 (1881).

³⁰ 124 Mo. 630, 28 S. W. 70 (1894).

available remedial rights which are inconsistent in theory, and that a final election is made by the mere commencement of an action, is of modern origin.

In Coke on Littleton³¹ we find these maxims:

"Electio semel facta, et placitum testatum non patitur regressum."

"Quod semel placuit in electionibus amplius displicere non potest."

The author, however, is careful to explain that the scope of the maxims is limited to a choice between real and personal actions, and that they do not apply to actions "merely personal."

In Comyns' Digest³² the author says:

"But where an election is of several *remedies* if he chuses one he may afterwards have the other in personal cases as where he has election of several actions. Co. L. 146 A."

Sir William Blackstone concurred in the decision of the case of *Hitchin v. Campbell*.³³ The plaintiffs in that case were assignees of a bankrupt. As such they had previously brought an action of trover against one who had levied on and obtained goods of the bankrupt subsequent to the act of bankruptcy. There was a verdict for the defendant in the first action. They then brought the present action of assumpsit against the same defendant. The court says:

"Another and much stronger objection was that though the assignees may have their election to bring either an action of tort or contract yet they cannot bring both. . . . Cases have been cited to shew that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrein or bring assise; but not both, Litt. S. 588. May bring writ of annuity or distrein, S. 219, and his election is determined even though he should not recover after he hath counted thereon, Co. Litt. 145, but where both remedies are merely real or merely personal then the election is not determined till the judgment on the merits. For a non-suit on an action of account is no bar to an action of debt, Co. Litt. 146. And so must Holt in 12 Mod. 324 be understood to mean that if they bring one they shall not afterwards bring the other; *i. e.*, if the first be brought to a due conclusion."

³¹ Co. Lit. 146 a.

³² Comyn's Digest, tit. Election (c) 2.

³³ 2 W. Bl. 827.

Chitty in his work on Pleading, after an extended discussion of election between different actions, says,³⁴

"The circumstances of a party having elected one of several remedies by action will not in general preclude him from abandoning such suit and after having duly discontinued it, he may adopt any other remedy."

An early case sometimes relied on as supporting the modern statements of the rule is *Smith v. Hodson*.³⁵ This was an action of assumpsit on facts which would have justified an action of trover. The defendants pleaded a set-off, which was objected to by the plaintiffs because of the defendants' tort. It was admitted that the set-off could not have been pleaded if the action had been in form *ex delicto*. The court said that the plaintiffs could not "blow hot and cold," and having elected to proceed in assumpsit they must abide by the consequences. This case is not authority for the rule that the commencement and discontinuance of an action of assumpsit would have been a binding election.

Other early cases, cited in support of the doctrine, involved an election between real and personal actions.³⁶ Between 1800 and 1850 a number of cases were decided in England which are cited in later cases as supporting the modern rule of election. These cases are not sound authority for the modern rule. Thus in *Morris v. Robinson*³⁷ it was held that there was no election to waive the tort by an unsuccessful application to a court to obtain the proceeds of the property converted. In *Brewer v. Sparrow*³⁸ the plaintiffs ratified the sale by actually accepting the proceeds. In *Valpy v. Sanders*³⁹ it was held that there was no election to ratify a conversion by an unsuccessful demand for the price of the goods. In *Lythgoe v. Vernon*⁴⁰ the plaintiff had demanded and received from the defendant all but a small part of the proceeds of a wrongful sale by the defendant of the plaintiff's property. In none of the above cases is there any statement of the rule in its modern form.

In *Smith v. Baker*,⁴¹ however, we find the following language:

³⁴ Chitty, Pleading, 234.

³⁵ 2 Smith's Leading Cases, 146.

³⁶ *Dumpor's Case*, 1 Smith's Leading Cases, 8 ed., *47; *Jones v. Carter*, 15 M. & W. 718 (1846); *Grimwood v. Moss*, 41 L. J. C. P. 239 (1872).

³⁷ 3 B. & C. 196 (1824).

³⁸ 5 C. B. 886 (1848).

³⁹ 7 B. & C. 310 (1827).

⁴¹ L. R. 8 C. P. 350 (1873).

⁴⁰ 5 H. & N. 180 (1860).

"But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass or trover is a conclusive election the other way."

This statement of the rule, however, was not called for by the facts of the case as the plaintiff in that case had not merely commenced a prior proceeding, based on ratification of the defendant's act, but had actually obtained the proceeds of the sale by the defendant of the property converted.

In *Clough v. London Ry.*⁴² the question before the court was merely whether the defendant had waited too long before exercising his election to rescind.

The *dicta* as to election of remedies in *Scarf v. Jardine*,⁴³ which are in line with the modern rule, are made on the assumed authority of the quotation from Coke referred to above. The case presented was not one of election of remedies, but of election between rights to hold different defendants, *i. e.*, the right to hold A. and B. as partners who had actually received the plaintiff's goods, and the right to hold B. and C. as partners by estoppel. A. and B. having been sued and gone into bankruptcy, and the plaintiff having filed his proof of claim against them, he was not allowed to proceed against C.

It will be seen from this outline that the application of the doctrine of election by the English courts has been generally limited to cases where there were elements of estoppel *in pais*, with the single exception of cases dealing with real actions; and that the broadest statements of the rule are *obiter dicta* in comparatively recent cases.⁴⁴

Space forbids a reference to many of the American decisions. The manner of the growth of the doctrine is, however, well illustrated by a comparison of a late New York case with the early decision which it quotes as authority.⁴⁵ The later decision held that the mere filing of a verified proof of claim against the assignee of

⁴² L. R. 7 Exch. 26 (1871).

⁴³ 7 App. Cas. 345, 360-361 (1882).

⁴⁴ The English cases are reviewed in an article in 16 *Law Quarterly Review*, 160, criticising *Rice v. Reed*, [1900] 1 Q. B. 54.

⁴⁵ *Droege v. Ahrens Mfg. Co.*, 163 N. Y. 466, 57 N. E. 747 (1900); *Sanger v. Wood*, 3 Johns. Ch. (N. Y.) 416, 421 (1818).

an insolvent and fraudulent vendee was an election to affirm the contract so as to bar a suit to rescind. The court says:

"It was observed by Chancellor Kent in *Sanger v. Wood*, 3 Johns. Ch. 421, that any decisive act of a party with knowledge of his rights and of the fact, determines his election in cases of conflicting and inconsistent remedies. This is the principle upon which is based the doctrine of election of remedies."

But Chancellor Kent in the decision relied on had said,

"I consider the going to trial in the action at law and especially the entry of judgment afterwards upon the verdict as a decided confirmation of the settlement."

The result of this review of the operation and history of the doctrine may be summed up in this way: The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of *obiter dicta* but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least to prevent its further growth.

Charles P. Hine.

CLEVELAND, OHIO.

GENERAL TESTAMENTARY POWERS AND THE
RULE AGAINST PERPETUITIES.

HOW does the Rule against Perpetuities affect appointments under general testamentary powers? Or, to put the question in a concrete form: If personal property is bequeathed in trust to pay to such person as A. shall by will appoint, and A. appoints by will to B., who was not living at the death of the testator, for life, and on B.'s death to his children, is the appointment to B.'s children good? ¹

I have expressed the opinion that such appointment is bad.² My learned friend, Professor Kales, in an article which he kindly communicated to me, and has now published in this Review,³ thinks that the appointment is good. Mr. Kales's suggestions on the law deserve so much respect, and to me personally have been so often valuable, that I am moved to say a word or two why I cannot adopt them in this matter.

In judging of the remoteness of an appointment, the time must be calculated from the date of the creation of the power and not from the date of its execution.⁴ The reason of this is obvious: If a limitation would be bad, as too remote, it cannot be made good by delegating the power to make it to someone else. If what is given to the donee of a power is an authority to act for the settlor or testator, then the appointment by the donee must be considered as an appointment by the settlor or testator himself.⁵ Now to this there is an apparent exception, which comes about in this wise: Sometimes what is in form an authority from a testator or settlor to make a limitation is, in substance, not an authority to

¹ I put the case in this form to avoid running against any peculiarities, real or supposed, of contingent remainders in realty.

² Gray, Rule against Perpetuities, 2 ed., §§ 526-526 c.

³ 26 HARV. L. REV. 64.

⁴ I have pointed out, Gray, Rule against Perpetuities, 2 ed., §§ 523-523 b, that this does not require us to give the words used in executing a power a meaning different from that with which they are used by the donee of the power.

⁵ "One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent towards his principal. An agent cannot do that which the principal cannot do." Per Baldwin, C. J., 81 Conn. 34, 44.

make a limitation, but a limitation to the donee himself, a gift to him in fee. Such is the case when a general power is given to A. to appoint by deed. A. can there appoint to himself. When this is the case, A., the nominal donee, instead of going through the form of appointing to himself, may, so far as any question of remoteness is concerned, deal with the property as if he had gone through this form, and may treat it as he could any property of his own. That is, when A. makes what purports to be an appointment under such a power, what he really does is to make an appointment to himself, and then to grant his own property to the person named as appointee.⁶

Mr. Kales agrees with the general rule, and with the exception. The difference between us is this: Mr. Kales thinks the exception covers not only general powers, exercisable by deed, but also general testamentary powers. This I deny. Mr. Kales's argument is this: He takes up an expression, which I had used, that the exception applies when the donee is practically owner, and says that the question whether he is practically owner is to be determined at the time of the exercise of the power, and that when he exercises the power by will he is practically owner, and he illustrates thus: If a power is given to appoint by deed after the donee shall be married, he cannot appoint before he is married; his power to appoint is subject to the condition precedent of marriage, but after his marriage he can deal with the property as his own; so, Mr. Kales says, if a general testamentary power is given, it is a condition precedent that the donee shall die, but, when he has died, the condition precedent has been fulfilled, and he can deal by his will with the property as if it were his own.

⁶ An analogous situation is presented by *Routledge v. Dorril*, 2 Ves. Jr. 357. There a woman, having by her marriage settlement an exclusive power to appoint a fund among her issue, joined in the marriage settlement of a daughter, by which a part of the fund was put in trust for the daughter for life, with gift over to the daughter's children. The gift over was held good, that is, the daughter's marriage settlement was regarded as an appointment by the mother to the daughter and a settlement by the daughter as of her own property, though there was no formal appointment by the mother to the daughter. But in the same case the mother made a will in which she appointed another part of the fund to the daughter's children. The former transaction was regarded as an appointment by the mother to the daughter, and a settlement by the daughter. The second could not be regarded as an appointment to the daughter, but was an appointment to her children directly and was bad. See Gray, *Rule against Perpetuities*, 2 ed., §§ 528, 529.

But a man cannot, in the eye of the law, be at the same time alive and dead. So long as he is alive, the condition necessary for the exercise of the power is not fulfilled, and after he is dead he cannot be an appointee. And this is not only so as a metaphysical necessity. When a donee is given a general power by deed on his marriage, the creator of the power means to give the nominal donee on his marriage the absolute interest in the property; he does not mean to delegate his own right to make a limitation. But when he gives a testamentary power, he distinctly means that the donee shall have only a delegated authority; he does not mean at any time, or on the performance of any condition, to make a gift to the donee himself. When there is a power by deed given, the creator of the power means that at some time or on some condition the donee shall have in substance the fee. When a testamentary power is given, the creator as distinctly means that the donee shall never have the fee.

There is no dispute that the exception does not extend to special powers. Now, as a practical matter, from the point of view of the Rule against Perpetuities, there is no difference between a testamentary general power and a special power.

Suppose in the first place A. gives property to B. for life, with a power to appoint by will to B.'s issue (a special power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The gift to C.'s issue is unquestionably bad, as it is to vest on the death of a person born after A.'s death.

Suppose, in the second place, that A. gives property to B. for life, with a power of appointment by will to whomsoever he pleases (a general power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The limitations of the property are precisely the same in both cases; in both it is tied up during the lives of B. and C., and on C.'s death given to his surviving children. Practically there is absolutely no difference. And yet if appointments under general testamentary powers are referred to the time of their exercise, the gift to C.'s children is bad in one case and good in the other.

The donee of a power may be a person living at the date of the settlement or of the testator's death, or he may be a person then unborn.

Let us take the latter first.

First: When the power is given to an unborn person. The typical case is when, by a marriage settlement, property is given to the husband and wife for their joint lives, and on their deaths to such one or more of the children as the parents or the survivor of them may appoint. Here, if the surviving parent appoints to such persons as any one of the children may by deed appoint, an appointment by the child is good;⁷ but if the power given by the surviving parent to its child is testamentary, an appointment by the child is bad for remoteness.⁸

Mr. Kales recognizes that these cases state the law correctly, but he says they do not apply when the power is given to a living person. Let us take that up.

Second: When the power is given to a living person. The distinction that Mr. Kales makes between this case and the former is, that in the former the power itself is too remote, while in this the power is good in its inception, and if there is remoteness it is only in the appointment. But here an expression which I may have used, following other authorities, has, I think, led Mr. Kales into error. Remoteness, in connection with the Rule against Perpetuities, is a quality to be attributed to an estate or interest; a power is neither, and remoteness is not properly to be predicated of it.

It is true that no appointment under a power which may be exercised later than twenty-one years after a life in being is good, but it is not the whole truth, and it does not expressly state the reason why an estate appointed under such a power is too remote. The reason is this: No interest is good if its vesting is subject to a condition precedent which may be fulfilled beyond the required limits; the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised; if the power can be exercised beyond the required limits, the condition precedent may be fulfilled beyond the limits, and therefore the interest appointed under the power will be too remote.

But the exercise of a power may not be the only condition precedent to the vesting of an appointed estate, and therefore the exer-

⁷ *Bray v. Bree*, 2 Cl. & F. 453 (1834).

⁸ *Wollaston v. King*, L. R. 8 Eq. 165 (1869); *Morgan v. Gronow*, L. R. 16 Eq. 1, 9, 10 (1873).

cise of a power may be confined to a life in being, and yet no good appointment can be made under it. For instance, a power may be given to a living person to make an appointment to take effect upon the indefinite failure of someone's issue. No good appointment can be made under this power.⁹

When a testamentary power is given to a living person, two conditions precedent must be fulfilled in order that an appointment under it shall vest. The first condition precedent is that the power be exercised by the donee; as the donee is alive when the power is created, this condition precedent must be fulfilled within or at the end of a life in being, and therefore its existence will not render an appointment under the power too remote. But there is another condition precedent, namely, that the appointment vest within twenty-one years after a life in being, and accordingly an appointment which may not vest within that time is too remote. Thus, if a general testamentary power is given to A., and A. appoints to B., an unborn person, for life, and after his death to B.'s surviving issue, the appointment to B. is good, because both the conditions precedent must be fulfilled within the required limits, but the appointment to B.'s surviving issue is too remote, because, though the first of the conditions precedent cannot be fulfilled later than a life in being, the second may be.

Or, in other words, an appointment under a testamentary power is subject to the condition precedent that a life, the only life in question, has terminated; the estate appointed will therefore be too remote unless it must vest within twenty-one years after the death of the donee, and this is true whether the donee is alive or is an unborn person. If he is an unborn person, no appointment will be good, because of another condition precedent, namely, the exercise of the power within the period required. *But the question of the remoteness of an appointment under a power exercisable by deed is the same whether the power be to an unborn or to a living person, because such a power is not really a power at all, but is a direct limitation in fee.*

As to the authorities:

. That the remoteness of an appointment under a general testa-

⁹ *Bristow v. Boothby*, 2 S. & St. 465; *Gray, Rule against Perpetuities*, 2 ed., § 476 a.

mentary power must be calculated from the time of the creation of the power in the case when the power is given to a living person as well as when it is given to an unborn person, the leading authority is *In re Powell's Trusts*,¹⁰ in which the decision was made by James, V. C. This decision has been followed by the American courts.¹¹

There are two English cases and one Irish which are *contra* and hold that a general testamentary power to a living person should, like a general power by deed, be calculated, on the question of remoteness, from the time of the exercise of the power, and not from the time of its creation. These cases are *Rous v. Jackson*,¹² *In re Flower*,¹³ and *Stuart v. Babington*.¹⁴ The last two cases simply follow and rest upon *Rous v. Jackson*, and that case is the only one which needs to be considered.

Mr. Justice Chitty, who was the judge in that case, recognizes that he is differing from *In re Powell's Trusts*, and that "the question therefore arises whether the decision [in that case] is consistent with the course of authorities." He comes to the conclusion that the "Vice-Chancellor in that case fell into an error," and that "there must be some error, some slip, in the decision of James, V. C., in *In re Powell's Trusts*."

The statement of the authorities which Chitty, J., deems inconsistent with the decision in *In re Powell's Trusts* he gives in the following passage:

"Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers (Sugden on Powers, 8th ed.), 394, says: 'A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases.' He draws no distinction between a power exercisable by deed or will or by will only and it appears to me to make no difference by what instrument the power

¹⁰ 39 L. J. Ch. 188 (1869).

¹¹ *Lawrence's Estate*, 136 Pa. St. 354, 20 Atl. 521 (1890); *Boyd's Estate*, 199 Pa. St. 487; *Genet v. Hunt*, 113 N. Y. 158, 21 N. E. 91 (1889) (the case of *Frear v. Pugsley*, 9 N. Y. Misc. 316, *contra*, is only a decision of a single judge at Special Term, made without discussion, and in view of *Genet v. Hunt* need not be considered); *Reed v. McIlvain*, 113 Md. 140 (1910).

¹² 29 Ch. D. 521 (1885).

¹³ 55 L. J. Ch. 200 (1885).

¹⁴ L. R. 27 Ir. 551 (1891).

is made exercisable. Lord St. Leonards also says (395): 'Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it.' He goes on to quote Mr. Powell's note to Fearn's Executory Devises (p. 5), in favor of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee.

"There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established 'after a series of cases.' Butler's Coke upon Littleton (272 a)." ¹⁵

But the learned judge does not give all that is said by the authors whom he cites, and what he omits shows beyond doubt that they were referring to powers exercisable by deed, for the language in the omitted places is utterly inapplicable to general testamentary powers. Thus, at the end of the first extract from his book on Powers, Lord St. Leonards, after the word "pleases," adds:

"he has an absolute disposing power over the estate, *and may bring it into the market, whenever his necessities or wishes may lead him to do so.*"

So when considering Powell's note, Lord St. Leonards says: ¹⁶

"To take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to a perpetuity, is created. *The donee may sell the estate the next moment.*"

So Butler ¹⁷ says:

"A general power of appointment has no tendency to a perpetuity, as from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation, inconsistent with that fee."

¹⁵ This is a wrong reference. Butler's note on the subject is to Co. Lit. 271 b. The true reference appears in the report of *Rous v. Jackson*, 54 L. J. Ch. 732, 735.

¹⁶ Sugden, Powers, 396.

¹⁷ In his note to Co. Lit. 271 b, VII, 2.

It should be observed that whereas in this country testamentary powers are more common than powers exercisable by deed, in England powers exercisable by deed, or by deed and will, are the more usual, and when English judges and writers speak of a general power they ordinarily mean powers which can be exercised by deed as well as by will.

It is therefore submitted that the American courts have done well, both on principle and on authority, in following *In re Powell's Trusts* rather than the later case of *Rous v. Jackson*.¹⁸

John Chipman Gray.

HARVARD LAW SCHOOL.

NOTE.

If A owns property and devises it, the remoteness of the interests limited are determined by reference to his death. Whether he has owned the property during his entire life or acquired it only the moment before his death, the rule is the same. The fact that he acquired the property the moment before his death and therefore had, practically speaking, no power to enjoy or alienate it in his lifetime is immaterial.

A, with a general power to appoint by deed, is in the same position as the owner in fee who enjoyed such ownership during his life. A, with a general power to appoint by will only, is in the same position as the person who acquires property the moment before he dies. If the remoteness of the interests appointed are to be determined as of the date of appointment in the former case because it is the same as if A had the fee during his lifetime, why should not the remoteness of the interests appointed be determined as of the date of the appointment in the latter case because it is the same as if A had acquired the property the moment before he died?

In short, if you make no difference between the case where A owns property during his lifetime and the case where he acquires

¹⁸ The advantage from using a power instead of making a direct gift is, not that you can do through a power what you cannot do directly, but that a limitation which would be valid, but which it could not be originally seen would affect a desired end, may be later seen to do so. See an instance in Gray, *Rule against Perpetuities*, 2 ed., § 523 e.

it only the moment before death, why should you make any difference between the case where A has a general power of appointment by deed in his lifetime and the case where he has a general power to appoint by will only at his death?

A. M. Kales.

NORTHWESTERN UNIVERSITY LAW SCHOOL.

SHARES WITHOUT NOMINAL OR PAR VALUE.

A JOINT-STOCK corporation necessarily must have some capital, and it must have shareholders; and, for obvious reasons of policy, it is desirable that the amount of capital which a corporation must have before incurring indebtedness and which may not be impaired by the declaration of dividends should be fixed definitely by its charter or articles of association. However, it is not necessary that the amount of capital should be fixed by reference to the nominal or par amount of the shares issued by the corporation, and it is not necessary that the shares should purport to represent specified sums of money contributed to the capital.

The customary scheme of corporate organization, under which the capital of the corporation is supposed to be fixed by the nominal or par amount of its outstanding shares and the shares are supposed to represent specified sums contributed to the capital, has not worked well in practice, except as applied to corporations, like banking corporations, whose business is to deal in money, credits, and securities, and whose assets are kept in liquid form. In most cases, the capital, or a large part of the capital, of a corporation is invested permanently in fixed plant or machinery which cannot again be converted into cash, and whose value, in great measure, depends upon the profitableness of the company's business. For many years the custom has prevailed of issuing paid-up shares of such corporations in consideration of property taken at a valuation largely in excess of its money value. Under the laws of some of the states neither the subscription nor the payment of the whole amount of the nominal share capital of a corporation is a condition precedent to its right to engage in business and to incur debts. In some cases corporations have even been authorized by law to issue their paid-up shares at a discount, or, in other words, to disregard the statements in the charter and in the share certificates as to the amount of the company's capital and the amount of the several shares. Moreover, some corporations are formed to invest their capital in wasting properties, like mines, and to redistribute among their shareholders the proceeds of these properties

without making a suitable reserve for depreciation. For these reasons the nominal amount of the capital of a corporation, other than a banking corporation, rarely indicates the amount of its actual capital, or the amount originally contributed by its shareholders.

It often happens that a corporation having an established business finds itself in need of capital and desires to raise the required capital by selling additional shares at their market value. However, if the market value of the shares should be less than their nominal or par amount, the corporation would be precluded from raising money by selling shares, inasmuch as they could not be issued lawfully for less than their nominal or par amount, while, of course, no one would be willing to pay more than their actual or market value. The corporation thus would be forced to raise the required capital by borrowing and increasing its indebtedness, although it would be sound business policy and in the interest of its creditors as well as its shareholders to raise the needed capital by selling shares at their market value.

To meet such a situation, and also to obviate the supposed evils of "stock watering," a statute was passed in New York for the creation of corporations with shares having no nominal or par value.¹ A corporation formed under this statute must state in its certificate of incorporation the amount of capital with which it

¹ Act of April 15, 1912, being §§ 19 to 23 of the Stock Corporation Law.

As many of the existing statutory provisions and rules of law relating to the capital stock and shares of corporations should be made applicable to corporations organized under the new law with shares having no nominal or par value, the following important provision was inserted in the New York statute: "§ 23. *Amount of capital stock and of shares within meaning of other laws.* For the purpose of any rule of law or of any statutory provision (other than the foregoing sections nineteen, twenty, twenty-one and twenty-two) relating to the amount of the capital stock of a corporation or the amount or par value of its shares, the aggregate amount of the capital stock of any such corporation formed pursuant to section nineteen hereof shall be deemed to be the aggregate amount specified in the certificate or amended certificate of incorporation or of reorganization, as the amount of capital with which the corporation will carry on business; the amount of the par value of each share of preferred stock having a preference as to principal shall be deemed to be the amount thereof so specified in such certificate or such amended certificate; and the amount or the par value of each other share shall be deemed to be an aliquot part of the aggregate capital so specified in such certificate or in such amended certificate in excess of the specified amount (if any) of the preferred stock therein authorized to be issued with a preference as to principal."

will carry on business, and it is prohibited from engaging in business or incurring debts until the stated amount of capital shall have been received by the corporation in money or in property at its actual value. However, the shares issued by the corporation would have no nominal or par value, and the corporation would be permitted to issue and sell them at their actual or market value.

The policy of the New York statute is sound. It recognizes that shares in a corporation represent only aliquot interests in its capital, whatever that may be, and that their nominal or par value is no indication of their actual value or of the actual capital of the corporation. It requires the amount of the actual capital of a corporation formed under the law to be stated in the certificate of incorporation, and imposes a severe penalty upon the directors in case of the creation of indebtedness before receiving the prescribed capital. Thus it furnishes to creditors and to the public generally a measure of protection greater than that furnished by the generally prevailing incorporation laws. At the same time it is in furtherance of sound business methods by enabling corporations to raise money by selling shares at their actual value instead of by borrowing or otherwise increasing their indebtedness.

Victor Morawetz.

NEW YORK CITY.

TRIAL BY JURY IN UNITED STATES COURTS.

IN the recent case of *Slocum v. New York Life Insurance Co.* (decided April 21st) a majority of the Supreme Court (White, C. J., and McKenna, Day, Van Devanter, and Lamar, JJ.) have given an extraordinary effect to the Seventh Amendment of the Constitution, which declares the right of trial by jury in actions at common law. The case was an action upon a policy of life insurance in the United States Circuit Court in Pennsylvania. At the trial counsel for the defendant asked the court to direct a verdict for the defendant on the ground that there was no evidence of payment of the premium or of any arrangement modifying the terms of the policy. This direction was refused and the jury gave a verdict for the plaintiff. By a Pennsylvania statute¹ it is provided that when "a point requesting binding instructions has been reserved or declined" at a trial, the evidence may be made part of the record and, upon motion for judgment *non obstante veredicto*, such judgment may be entered as shall be warranted by the evidence. The Court of Appeals held that the evidence did not warrant a verdict for the plaintiff and that a verdict for the defendant ought to have been directed, and (following the state practice according to § 914 of the United States Revised Statutes) directed judgment to be entered for the defendant. The Supreme Court also held unanimously that the evidence did not admit of a finding that the policy was in force at the time of the death and that a verdict for the defendant ought to have been directed at the trial. But, as this had not been done, the majority of the court held that a new trial should have been directed, and that the court could not give judgment for the defendant, because the Seventh Amendment provides that,

"in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

¹ Pa., Laws of 1905, c. 198, p. 286.

It is admitted in the judgment of the majority delivered by Van Devanter, J., that the aim of the amendment was not to preserve mere matters of form and procedure, but of substance. But it is declared that the right to a trial by jury is determined by the pleadings and not by the evidence, and, if an issue of fact is presented by the pleadings, each party is entitled to have it tried by a jury. Although a party is entitled as matter of law to have a verdict against him set aside when the judge at the trial ought to have directed the jury to give a verdict in his favor, yet it is said that the verdict operates under the Constitution to prevent a disposition of the case without a new trial, because a new trial was the only means provided by the rules of the common law for that purpose, and that this right to a new trial is a matter of substance and not of form.

Hughes, J., in delivering the judgment of the minority (Holmes, Lurton, Hughes, and Pitney, JJ.) says:

"The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the federal courts in Pennsylvania in applying, under the Conformity Act, the provisions of the state law, but it erects an impassable barrier — unless the Constitution be amended — to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation."

Although it is said by the majority of the court that the right to a trial by jury is determined by an inspection of the pleadings, it is not shown why it is to be determined in that way. The Constitution gives a right to have questions of fact tried by a jury, but it does not say how it shall be ascertained whether there are any such questions. Pleadings are not necessary to show what questions of fact are in dispute, and they are only a part of the forms of procedure.² The English rules of court provide in Order 18A for trials without pleadings. In *Nash v. Inman*,³ there was merely a writ indorsed with a claim for £145 10s. 3d. for clothes supplied

² See Thayer, Preliminary Treatise on Evidence, 366-368, on this subject, referring to a report of a committee of the English judges in 1881, of which some further details are given in an interesting note in 4 HARV. L. REV. 184 (1890).

³ [1908] 2 K. B. 1.

to the defendant, an undergraduate at Cambridge. At the trial, the defendant set up that he was an infant, and the plaintiff contended that the question whether the clothes were necessities should be submitted to the jury. But the judge held that there was no evidence that they were necessities, and, without taking any verdict from the jury, directed judgment for the defendant. The Court of Appeal, agreeing with the judge that there was no evidence for the jury, held that it did not matter whether he directed a verdict for the defendant or entered judgment for the defendant. In this case the question of fact to be determined by the jury could not have been ascertained from any pleadings, and the evidence showed that there was no such question. In fact the real questions in dispute generally appear only when the evidence is produced, although there may be a formal issue shown by the pleadings. In the actual case before the Supreme Court there was a statement of claim, alleging the making of the policy of insurance and the death, and containing various details of evidence of an arrangement with an agent about payment of the premium. The plea was "*non assumpsit*," and this presented a formal issue.⁴ But the real question in dispute was whether an agreement regarding the premium had been made with an agent which the agent had authority to make. These pleadings gave no more intimation of this question than would have been given by an indorsement on the writ that "the plaintiff's claim is \$20,000 upon a policy of insurance upon the life of Alexander W. Slocum deceased."⁵ When the evidence was placed upon the record as the statute required, the record showed that there was no question of fact to be tried, as plainly as it would have done if the statement of claim had shown no cause of action.

A question of fact is not capable of being tried without some evidence on one side or the other. If a case, in which the pleadings show an issue of fact, is opened to the jury, and the party having the onus of proof openly admits that he has no evidence whatever to offer, there is no question of fact to be tried. If he offers evidence

⁴ The plea was as follows: "And now, to wit, August 11th, 1908, comes the New York Life Insurance Company, defendant above-named, by . . . its attorneys, and pleads non-assumpsit."

⁵ This is the form of indorsement authorized by the English rules of court under Order 18 A; see Appendix A, pt. III, s. 2.

that would not justify a verdict in his favor if it were believed, he is in the same position. The judge would direct the jury to give a verdict for the other party, but the jury would not exercise any judgment in the matter and would not try any question of fact.⁶ That is not what is meant in the Constitution by a trial by jury. When a verdict is directed in favor of one party on the ground that the evidence does not warrant a verdict for the other party, the case is said to be "withdrawn" from the jury or "not submitted" to the jury.⁷ The form of entering a verdict is employed, because that is the most convenient, if not the only, form of proceeding to dispose of the case according to the existing rules. In *Sparf and Hansen v. United States*⁸ the Supreme Court quoted with approval Miller and McCrary, JJ., saying, "It would be a useless *form* for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law."

If the right to a trial by jury is not denied when the jury are directed to find a particular verdict without being allowed to consider the evidence, it is difficult to see how any such right is interfered with by the entry of a judgment instead of a verdict. There is no difference in substance between the two modes of proceeding, as shown by the English case of *Nash v. Inman*,⁹ already mentioned. If the judge at the trial has not directed a verdict when he ought to have done so, it seems only a matter of form and procedure to correct the error by entering judgment for the party in whose favor the verdict ought to have been directed.

It is also shown by Hughes, J., that even the forms of procedure at common law provided a means of questioning the sufficiency of the evidence and obtaining a final judgment without going through the form of entering a verdict, and that this did not differ in sub-

⁶ See *Curran v. Stein*, 110 Ky. 99, 103, 60 S. W. 839 (1901) and *Cahill v. Chicago, Milwaukee, & St. Paul Ry. Co.*, 74 Fed. 285, 290 (1896), where there was difficulty in inducing the jury to obey the direction.

⁷ *Marion County v. Clark*, 94 U. S. 278, 284 (1876); *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 482 (1883); *Carter v. Carusi*, 112 U. S. 478, 484 (1884).

⁸ 156 U. S. 51, 105 (1895).

⁹ [1908] 2 K. B. 1.

stance from a motion for judgment or to direct a verdict on the same ground. This was the demurrer to the evidence, which fell into disuse, and the practice of moving to direct a verdict took its place, and was tested by the same rules. Van Devanter, J., says, however, that there was a pronounced difference between them, for, on such a demurrer, if judgment is not given for the party demurring, it is necessarily given for his opponent, while, if a motion to direct a verdict is refused, the party may still go to the jury on the evidence. But it will hardly be asserted that a statute permitting him to demur to the evidence *without* thereby losing his right to a verdict from the jury would infringe the provisions of the Constitution. If such a statute would be valid, this distinction vanishes. It is not apparent, therefore, how the Constitution interferes with a statute authorizing a motion for judgment upon the same grounds upon which a demurrer to the evidence was allowed, and an appeal if the motion is refused and the case submitted to the jury.

It is said in the judgment of Van Devanter, J., that the verdict operated under the Constitution to prevent a reëxamination of the issues save on a new trial, and that the Court of Appeals, instead of ordering a new trial, "reëxamined the issues, resolved them in favor of the defendant, and directed judgment accordingly." But the Court of Appeals did not examine or decide any question of fact. It examined the evidence, and decided that there was no evidence that would justify the verdict; and all the judges of the Supreme Court made the same examination and came to the same conclusion. The reëxamination that the Constitution forbids is a new inquiry into the truth of the *facts* ascertained by a verdict. No such examination was made, and, when it was determined that the evidence did not justify a verdict for the plaintiff, the verdict ceased to have any effect and was as if it had never been given, as the learned judge himself says. It is difficult to understand how the Constitution in these circumstances prevented the court from entering judgment for the defendant in accordance with the statute.¹⁰

¹⁰ A point was made that, if the judge at the trial had intimated that he should direct a verdict for the defendant, the plaintiff might have become non-suit and then brought another action. But the right to become non-suit depends only on rules of practice and derives no support from the Constitution. In Massachusetts

The decision of the majority of the court is a public misfortune, because it destroys a simple means of enforcing, without the expense, delay, and uncertainty of a new trial, a right to which the decision shows that a party was entitled at the trial. There is, however, a way in which the consequences of the decision may be mitigated. The Pennsylvania statute provides only for recording the evidence, when the judge is asked to direct a verdict. If some words were added authorizing also the recording of such alternative or other findings as the judge may think proper to take, then the court on a subsequent motion or on appeal could enter the proper judgment on the alternative finding. For example, in the case just decided, the judge might have directed the jury, if they gave a verdict for the plaintiff, to give also an alternative verdict for the defendant if the court should be of opinion that the evidence did not justify a verdict for the plaintiff. The alternative verdict would be as good as if it had been the only verdict,¹¹ and nobody could say that the Constitution was infringed by entering judgment upon it. This may seem a mere form, but, if the decision is right, it is a matter of substance. Such a practice would not materially differ from that ordinarily employed in England at common law for many years previously to 1875, by which leave was reserved at the trial to enter the verdict according to the decision of the court upon the questions of law, as explained in *Treacher v. Hinton*,¹² in the King's Bench in 1821. If that practice had been in general use here, a statute authorizing the entry of a judgment, instead of varying the verdict in accordance with the leave reserved at the trial, would never have seemed anything more than a mere change of form.

J. L. Thorndike.

BOSTON, MASSACHUSETTS.

there never was any such right after the case had been opened to the jury. *Shaw v. Boland*, 15 Gray (Mass.) 571, 572-573 (1860). If such a right existed in Pennsylvania, it was gone when the plaintiff got a verdict, and the case was then subject to the statutory provisions for entering judgment for the defendant if the verdict was not warranted by the evidence.

¹¹ *Walker v. New Mexico and Southern Pacific R. Co.*, 165 U. S. 593 (1897).

¹² 4 B. & Ald. 413, 416-417 (1821). See also *Reed v. Kilburn Co-operative Society*, L. R. 10 Q. B. 264 (1875); *Hobbs v. London & Southwestern Ry. Co.*, L. R. 10 Q. B. 111, 113, 125 (1875). The procedure since the Judicature Act is shown by *McQuire v. Western Morning News Co.*, [1903] 2 K. B. 100.

HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, \$2.50 PER ANNUM 35 CENTS PER NUMBER.

Editorial Board.

ROBERT A. TAFT, *President.*
MAXWELL BARUS,
RALPH O. BREWSTER,
HARVEY H. BUNDY,
EDMUND BURROUGHS,
PRESCOTT W. COOKINGHAM,
JOSEPH J. DANIELS,
E. MERRICK DODD, JR.,
OSCAR R. EWING,
JOHN W. FORD,
C. PASCAL FRANCHOT,
ARTHUR A. GAMMELL,

WILLIAM S. WARFIELD, III, *Treasurer.*
MAURICE HIRSCH,
ALLEN T. KLOTS,
VAN S. MERLE-SMITH,
ABBOT P. MILLS,
LEROY P. PERCY,
ROBERT W. PERKINS, JR.,
JAMES J. PORTER,
VINCENT STARZINGER,
WALDEMAR Q. VAN COTT,
G. TRACY VOUGHT, JR.,
BOYKIN C. WRIGHT,

FRANCIS S. WYNER.

THE SEVENTH AMENDMENT. — The Supreme Court of the United States has held in a recent decision that the Seventh Amendment¹ prevents Congress from authorizing an appellate court to enter judgment, as may be done in Pennsylvania, Massachusetts, and other states, when the trial judge has erred in failing to direct a verdict. *Slocum v. New York Life Ins. Co.*, 33 Sup. Ct. 523. Four justices dissented vigorously, pointing out that the higher court is thus prevented from rendering the same decision which it was the right and duty of the trial judge to render. A short article by Mr. John L. Thorndike in the present number of this REVIEW renders an extended discussion unnecessary here. The logical consequences of the decision, however, may go far. How does the matter stand, for example, if the jury refuses to enter a verdict properly directed by the court? The right to direct a verdict ought to carry with it the power to enforce the order;² and a statute authorizing a court to enter the verdict if the jury proves recalcitrant would seem the merest common sense. But would not such a statute according to the reasoning of this opinion violate the Seventh Amendment?

PRINCIPLES GOVERNING RECOVERY BY PARTIES TO ILLEGAL CONTRACTS. — For obvious reasons of policy the courts will not in general

¹ Art. VII. " . . . The right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

² *Curran v. Stein*, 110 Ky. 99; *Cahill v. Chicago, M. & S. P. Ry. Co.*, 74 Fed. 285.

lend their aid to the enforcement of illegal contracts.¹ The much broader doctrine is often laid down that if the parties are equally responsible for the unlawful agreement, the law will refuse to give to either any relief from the situation arising out of the contract, since *in pari delicto melior est conditio possidentis*.² If the law treated participants in illegal transactions in all respects as legal outlaws, the doctrine might do no great injustice to the parties concerned, although it would hardly promote the public peace. But the law does concern itself with illegal undertakings to the extent of validating executed transactions such as the passing of title, and of protecting titles thus acquired.³ The result is to secure to the cleverer or more fortunate wrongdoer the continued enjoyment of his unjust enrichment, and to punish the other party to an extent which may be utterly disproportionate to the magnitude of his offense.⁴ The probability of such injustice would seem, at least in the case of minor infractions of the law, clearly to outweigh any benefit which may result from the rule in the way of discouraging illegal transactions.

As a result of such considerations as these the courts, besides being rather willing to find that the parties are not really *in pari delicto*,⁵ have come to recognize several exceptions to the doctrine. At least if the illegality is not of a serious nature, either party may rescind while the illegal act is still unperformed.⁶ So, too, if the illegal contract be induced by fraud, the weight of authority is in favor of allowing rescission by one whose offense is not *malum in se*.⁷ While these limitations on the general doctrine have considerably lessened its evils, they furnish no relief in many cases in which the rule works a palpable injustice, as where all recovery is denied if property has been transferred on Sunday.⁸

¹ *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420; *Case v. Smith*, 107 Mich. 416, 65 N. W. 279.

² *Robeson v. French*, 12 Metc. (Mass.) 24; *Shaffner v. Pinchback*, 133 Ill. 410, 24 N. E. 867. According to the English rule the maxim applies only to cases where the plaintiff cannot make out his case without the aid of the illegal transaction. *Taylor v. Chester*, L. R. 4 Q. B. 309. This formal rule has been generally repudiated in this country. *Sampson v. Shaw*, 101 Mass. 145; *Johnson v. Hulings*, 103 Pa. St. 498.

³ See *Thompson v. Williams*, 58 N. H. 248, 249. See KEENER, QUASI-CONTRACTS, 270. This doctrine is not, however, clearly established in all jurisdictions. See *Cranson v. Goss*, 107 Mass. 439, 441.

⁴ See an article by Professor Wigmore in 25 AM. LAW REV. 695, 712.

⁵ Parties are held not to be *in pari delicto* where the contract is made illegal for the protection of one of them. *Brown v. McIntosh*, 39 N. J. L. 22; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614. Nor where the contract is brought about by duress or any undue influence exerted by one party. *Atkinson v. Denby*, 6 H. & N. 778, 7 H. & N. 934; *Klein v. Pederson*, 65 Neb. 452, 91 N. W. 281. Voluntary participants in illegal action would seem, however, to be *in pari delicto*, notwithstanding the fact that one is more at fault than the other. See dissenting opinion of Sanborn, J., in *Stewart v. Wright*, 147 Fed. 321, 339, 340. See also WOODWARD, QUASI-CONTRACTS, § 142; 20 HARV. L. REV. 60. There is, however, authority for the contrary view. *Webb v. Fulchire*, 3 Ired. (N. C.) 485; *Lockman v. Cobb*, 77 Ark. 279, 91 S. W. 546.

⁶ *Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356; *Eastern Metal Co. v. Webb Granite Co.*, 195 Mass. 356, 81 N. E. 251. Since the object of this rule is to prevent a violation of the law if possible, the *dicta* that it does not extend to serious offenses seem unsound.

⁷ *Webb v. Fulchire*, *supra*; *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 Sup. Ct. 512; *American Mutual Life Ins. Co. v. Bertram*, 163 Ind. 51, 70 N. E. 258. *Contra*, *Babcock v. Thompson*, 3 Pick. (Mass.) 446; *Plaisted v. Palmer*, 63 Me. 576.

⁸ *Thompson v. Williams*, *supra*; *Myers v. Meinrath*, 101 Mass. 366.

The maxim is merely a method of expressing a consideration of policy, and the maxim is so much broader than the legitimate scope of the policy that it would be well to discard it altogether. The real question at issue is whether in any particular case the ends of the law will be furthered or defeated by granting the relief asked. That the direct enforcement of the contract is generally undesirable may be taken for granted.⁹ Furthermore, where recovery of the reasonable value of goods sold or services rendered is sought, the result of granting such relief is to assure to one who performs an unlawful agreement a right to obtain money in exchange for his services which is likely to be the chief object of his contract. This form of relief thus tends to execute the illegal agreement, and it should therefore be granted somewhat sparingly.¹⁰ If, however, the plaintiff asks merely for rescission and the restoration of property transferred without consideration, to allow him recovery will often prevent the otherwise probable execution of the contract, and in any case is a repudiation and not an execution of the contract. Under these circumstances there would seem to be in general no sufficient reason for refusing to entertain a suit based upon ordinary equitable or quasi-contractual principles such as unjust enrichment or fraud. If, however, the parties, as a result of their contract, have committed a serious crime, there is stronger reason for saying that they have forfeited all right to legal aid. A recent case which denied to a participant in a felonious marriage the recovery of property conveyed to the supposed wife who had induced the crime in order to defraud him of this property may therefore be supported.¹¹ *Szlauzis v. Szlauzis*, 255 Ill. 314, 99 N. E. 640. It would seem doubtful, however, if public policy is really served by such a decision, for the protection afforded the defrauder probably encourages him more than it frightens others. The reluctance of the courts to adjust the rights of criminals is hardly a sufficient reason for allowing clever scoundrels to defraud their victims whenever they can involve them in crime.

EFFECT OF BAD MOTIVE IN THE LAW OF TORTS. — A novel situation in a recent Massachusetts case presents in an interesting way the effect of bad motive in the law of torts. A landowner erected a large sign on her land bearing the words, "For Sale. Best Offer from Colored Family." Although intending to sell, the defendant was actuated by ill-will toward

⁹ It is permitted only in case the illegality of the contract is a mere directory provision, and in some cases where the contract is illegal only because *ultra vires*. *Larned v. Andrews*, 106 Mass. 435; *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390.

¹⁰ See KEENER, QUASI-CONTRACTS, 262; *Stewart v. Thayer*, 170 Mass. 560, 563, 49 N. E. 1020, 1022. This objection does not apply if most of the contract is still executory.

¹¹ See RECENT CASES, p. 756. Many even of the more modern cases take this view. *Knight v. Linzey*, 80 Mich. 396, 45 N. W. 337; *Schmitt v. Gibson*, 12 Cal. App. 407, 107 Pac. 571. See *Lowell v. Boston & Lowell R. Co.*, 23 Pick. (Mass.) 24, 32; *Tracy v. Talmage*, 14 N. Y. 162, 181. *Contra*, *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934; *Stewart v. Wright*, *supra*. The last two cases are perhaps distinguishable from the principal case, since in them there was in substance no execution of the illegal contract but merely an elaborate pretense carried out for the purpose of defrauding the plaintiff.

the plaintiffs, and by the threatened sale was seriously interfering with their real-estate business. An injunction, however, was denied. *Holbrook v. Morrison*, 100 N. E. 1111 (Mass.).

Accepting as true the proposition that intentional damage is *prima facie* tortious and requires a justification,¹ the problem is under what circumstances a bad motive will deprive the defendant of a justification otherwise good? A justification may be said to be the law's permission to injure others because of some countervailing benefit to society outweighing the harm done. The benefit may assume many forms: prevention of crime, freedom of speech, free competition, or the free beneficial use of property by its owner. To escape liability the defendant must show that he was acting under some such justification, that is, accomplishing the purpose or achieving the results which the law aims at in granting it. In many cases, as where a public officer arrests a supposed felon, or where defamatory statements are made in judicial proceedings, the law disregards motive altogether, notwithstanding the prisoner's innocence or the statement's falsity. It is so important that crime be detected and that justice be administered fearlessly, that the law must run the risk of occasional mistakes and malicious motives. On the other hand, in some cases the slightest taint of bad motive influencing conduct may vitiate a justification, as where "actual malice" destroys a qualified privilege in defamation. In cases of this kind the benefit to the public is not great enough to outweigh the individual harm. There is no benefit to society in a freedom to do these acts when they are inspired by malice.²

It is submitted that all justifications will fall into one or the other of these two classes, the first where the objects sought for are so important that motive must be ignored, the second where the objects are not so important but that the presence of ill-will may turn the scale.³ In the first, bad motive can only be evidence as to whether the act is the one excused, that is, whether the defendant's conduct is of the kind causing the desired benefit, irrespective of the motive as a cause. Instead of speaking of a wholly bad motive as depriving the defendant of a justification, it is submitted that the only importance of motive is as a fact from which inferences can be drawn as to the existence of the necessary elements of the justification, or, in other words, whether the acts are serving the purposes or achieving the results at which the law aims. Thus if a man is really competing no amount of ill-will should deprive him of his

¹ One seems justified in the light of recent decisions and discussions in assuming this as a fundamental proposition in the law of torts. See *Skinner & Co. v. Shew & Co.*, [1893] 1 Ch. 413, 422; *Aikens v. Wisconsin*, 195 U. S. 194, 204, 25 Sup. Ct. 3, 5. See also POLLOCK ON TORTS, 9 ed., 22, 23. The question of a bad motive does not usually arise in cases of unintentional harm, but the analysis here suggested seems equally applicable.

² Malicious prosecution lends itself to the analysis here ventured. The wrong done is justified on public policy irrespective of motive if there is reasonable cause; where there is no reasonable cause there is still a justification unless bad motive appears. The law's object is so important that the act is protected unless both reasonable cause and honest motive are absent.

³ It is obvious that a particular justification may fall in either class according to different interpretations of public policy. Cf. *Munster v. Lamb*, 11 Q. B. D. 588 (1883), with *Gilbert v. The People*, 1 Denio (N. Y.) 41 (1841). See also *McLaughlin v. Cowley*, 127 Mass. 316, 319.

justification based on the benefits of free competition,⁴ but where one engages in business solely to injure the plaintiff without seeking or expecting personal gain the interference with the plaintiff's business is unjustified,⁵ the motive, however, being merely evidence that real competition does not exist. In the second class motive is material in and of itself.⁶

In the principal case the justification is the right to sell property as a necessary incident of beneficial ownership. Assuring to individuals the benefits of ownership is considered so important that motive has always been disregarded; therefore malice is relevant only as it sheds light on whether a real or a pretended sale is contemplated. If a mere pretense, the law's object is not achieved, and the plaintiff's damage is unjustified.⁷ But if a real sale is intended, ill-will should not take away the justification.⁸

CONTRACTS RELIEVING FROM LIABILITY FOR NEGLIGENCE. — It is generally admitted that in the absence of special circumstances a contract exempting one from liability for negligence is valid. Moreover, the result is the same whether the negligence is positive or negative in nature, whether the liability arises as a result of personal negligence or by virtue of *respondeat superior*,¹ or whether the damage is to person or property. To that extent the policy in favor of freedom of contract overrides the general objection that such contracts remove an incentive to carefulness.²

⁴ *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163 (1900). So also if he is getting a real benefit from a use of his property. *Falloon v. Schilling*, 29 Kan. 292 (1883). In this case the defendant erected cheap dwelling-houses on his land and rented them to negroes in order to influence the plaintiff who lived on adjoining property to sell to him at a low price. Although the defendant's dominant motive was to injure the plaintiff, he was receiving real benefit from the houses and was thus making a beneficial use of his property. The court refused to interfere.

⁵ *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. The Standard Oil Co.*, 152 Ia. 618, 132 N. W. 371 (1911). So also where one shoots off guns on his land, not for any benefit to himself but only to frighten the wild fowl away from his neighbor's decoy pond, an action will lie. *Keeble v. Hickeringill*, 11 East, 574 note (1706). The cases holding that no action lies for the erection of fences purely from spite are irreconcilable with the views here expressed, but a respectable minority of well-considered cases hold that such an action is maintainable. For a discussion of the cases involving drainage and spite fences, see Professor Ames's article in 18 HARV. L. REV. 411, 414, 415.

⁶ Numerous instances where motive is material are given in 18 HARV. L. REV. 411, 416, 417, 418. To the ones there given may be added the cases involving the enticement of a wife to leave her husband. *Bennett v. Smith*, 21 Barb. (N. Y.) 439 (1856); *Tasker v. Stanley*, 153 Mass. 148 (1891).

⁷ The court in the principal case says, "If she had put up the sign and had caused the advertisements to be inserted without any intention of selling her property but solely with the purpose of injuring the business and property of the complainants, there can be no doubt that such conduct on her part would have been actionable." *Holbrook v. Morrison*, 100 N. E. 1111. To the same effect are *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909); *Dunshee v. The Standard Oil Co.*, 152 Ia. 618, 132 N. W. 371 (1911).

⁸ For general discussions as to the place of motive in the law of torts, see 8 HARV. L. REV. 1; 18 HARV. L. REV. 411; 22 HARV. L. REV. 501.

¹ This distinction is suggested in *Little Rock & Ft. S. Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, and in *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149.

² *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. 385; *Dodd v.*

The question has arisen chiefly, if not entirely, in two classes of cases: contracts between master and servant, and contracts between public-service companies and members of the public. By the weight of authority contracts exempting a master from liability to a servant for negligence are ineffectual.³ In addition to the general objection to such contracts employees are at a disadvantage practically in negotiating with employers, and their injury without indemnity might lead to increased burdens on the state. Contracts exempting a public-service company from liability to a patron for negligence are almost universally condemned.⁴ Such an exemption might result in deterioration of the service. But this consideration is apt to be over-emphasized, for it is well settled that public-service companies may insure against liability for negligence,⁵ and in the long run such insurance would seem to have as much tendency to induce careless service as separate contracts of insurance with the patrons. Furthermore, the company has usually sufficient property of its own involved to furnish an incentive to careful service.⁶ The controlling reason why such contracts are not enforceable arises from the relation of the parties, as in the master and servant cases. The patron is at a disadvantage, for although the service is necessary the business is monopolistic. The fact that the public-service company might be com-

Central R. Co. of N. J., 76 Atl. 544 (N. J. L.); *Griswold, Adm'r v. New York & N. E. R. Co.*, 53 Conn. 371, 4 Atl. 261; *Coup v. Wabash, St. L. & P. Ry. Co.*, 56 Mich. 111, 22 N. W. 215; *Mann v. Père Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721; *Deming & Co. v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 17 S. W. 89.

As observed by Jessel, M. R., in *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

As to the argument of public policy, there is a famous passage by Burrough, J., in *Richardson v. Mellish*, 2 Bing. 229, 252: "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

³ *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388; *Hissong v. Richmond & D. R. Co.*, 91 Ala. 514, 8 So. 776; *Atchison, T. & S. F. Ry. Co. v. Fronk*, 74 Kan. 519, 87 Pac. 608; *Roesner, Adm'r v. Hermann*, 8 Fed. 782. *Contra*, *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; *Western & Atl. R. Co. v. Bishop*, 50 Ga. 465.

In view of the fact that the cases do not limit the rule to personal negligence, it seems impossible to reconcile it with the fellow-servant rule.

⁴ *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Welch v. Boston & A. R. Co.*, 41 Conn. 333; *Illinois Central R. Co. v. Beebe*, 174 Ill. 13, 50 N. E. 1019; *Rose v. Des Moines Valley R. Co.*, 39 Ia. 246. *Contra*, *Cragin v. New York Central R. Co.*, 51 N. Y. 61.

⁵ *Phoenix Ins. Co. v. Erie & Western Transportation Co.*, 117 U. S. 312, 6 Sup. Ct. 750; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387, 10 Sup. Ct. 365; *Trenton Passenger Ry. Co. v. Guarantors' Liability Indemnity Co.*, 60 N. J. L. 246, 37 Atl. 609; *American Casualty Insurance Company's Case*, 82 Md. 535, 34 Atl. 778. But see *Anonymous*, 5 Taunt. 605, 606.

⁶ By the weight of authority, a public-service company may limit its liability for loss by negligence to a substantial amount. *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151. *Contra*, *Overland Mail & Express Co. v. Carroll*, 7 Colo. 43, 1 Pac. 682.

pelled to render service without such a stipulation is not regarded as sufficient protection to the patrons from a practical standpoint. Moreover, the law imposes special duties upon the public-service company because of its relation to the public, and so far as these duties are essential to the service they are insisted upon more strictly than general common-law duties.⁷

The importance of the relation between the parties is further illustrated by cases where the company stipulates for exemption from liability for negligence, not as a public-service company, but simply as a member of society. There are two classes of cases. In one, the company does something not only beyond obligation but which increases the risk of loss through negligence, such as leasing part of a railroad's right of way, or operating a private siding. Here the courts are practically unanimous in allowing the exemption.⁸ In the other class the company simply owes no duty as a public-service company. For instance, where a railroad contracts with an adjoining property owner for exemption from liability for negligence, although the railroad operates its line as a common carrier, it owes no duties as such to the adjoining property owner. The parties contract as ordinary members of society. There is no danger of overreaching. Furthermore, even conceding that such contracts have a tendency to induce carelessness, as a practical matter the interest of the patrons and of the adjoining property owner usually involve separate considerations. Thus, while the danger from sparks is real to the property owner, it is inappreciable to the patron. Consequently, such contracts are also upheld.⁹ A recent case holding the contrary is practically without support on the authorities. *Stoneboro & Chautauqua Lake Ice Co. v. Lake Shore & Michigan Southern Ry. Co.*, 86 Atl. 87 (Pa.).

THE DIVISION OF POWERS IN GOVERNMENT. — In 1787 the distinct division of the government into legislative, executive, and judicial powers was regarded as the keystone of the Constitution. It was thought that if liberty could be preserved it would be by these carefully gradu-

⁷ The protection accorded to customers of public-service companies and servants is somewhat analogous to the law as to infancy. The respect for relational duties has an analogy in the policy against contracts affecting the duties of parents, or in derogation of the marriage relation. *Andrews v. Salt*, L. R. 8 Ch. 622; *Hussey v. Whiting*, 145 Ind. 580; 44 N. E. 639; *Irvin v. Irvin*, 169 Pa. St. 529, 32 Atl. 445.

⁸ Leasing part of a right of way: *Griswold v. Ill. Central Ry. Co.*, 90 Ia. 265, 57 N. W. 843; *Stephens v. So. Pac. R. Co.*, 109 Cal. 86, 41 Pac. 783; *Hartford Fire Ins. Co. v. C. M. & St. P. Ry. Co.*, 175 U. S. 91, 20 Sup. Ct. 33. Operating a private siding: *Porter v. N. Y., N. H. & H. R. Co.*, 205 Mass. 590, 91 N. E. 875; *Mo., K. & T., Ry. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159; *Mayfield v. So. Ry.*, 85 S. C. 165, 67 S. E. 132. For other cases where the company does something beyond its obligation as a public-service company, which involves an increased risk, see 2 WYMAN, PUBLIC-SERVICE CORPORATIONS, §§ 1015, 1018.

⁹ *Richmond v. N. Y., N. H. & H. R. Co.*, 26 R. I. 225, 58 Atl. 767. In this case a spur had been constructed, but a contract covering negligence in operating the main line was upheld. In *Thomason v. Kansas City So. Ry. Co.*, 122 La. 995, 48 So. 432, the court assumed the validity of such a contract, but construed the contract in question as not including negligence on the main line.

ated checks and balances. Federalist¹ and Republican² alike worshiped at the shrine of Montesquieu.³ A fear that any attempt to mend might mean only the disintegration of a not too firmly established central government, a veneration for authority, or the very applicability of this plan of government to the problems and conditions of those days carried it through the next two generations without a serious doubt as to its adequacy.⁴ Not until the stress of readjustment after the Civil War had begun to subside did anyone seriously question the finality of our plan of government.⁵ And the plan does not now lack for able and unprejudiced defenders.⁶ The majority of critics to-day, however, seems to agree that some modification of the strict theory is desirable.⁷

The more serious possibilities of the plan, however, have already been mitigated by the judiciary in developing and applying the Constitution to the increasingly complex problems of a centralizing government. In theory the three powers⁸ of government were made mutually exclusive, either expressly as in most of the state constitutions,⁹ or by implication as in the federal Constitution.¹⁰ But in practice the absolute separation was recognized as impossible¹¹ and it was left for the

¹ See Washington's Farewell Address. HAMILTON, FEDERALIST, No. 78. WORKS OF JOHN ADAMS, p. 186.

² JEFFERSON, NOTES ON VIRGINIA, 195. MADISON, FEDERALIST, No. 47.

³ MONTESQUIEU, L'ESPRIT DES LOIS, *livre* XI, c. VI, "De la Constitution d'Angleterre." Some critics still insist on the extreme form of Montesquieu's division. See SCHOULER, IDEALS OF THE REPUBLIC, chap. 9; WYMAN, ADMINISTRATIVE LAW, § 17. Although Aristotle speaks of three departments of government, his later language shows that he had little of the modern conceptions of their lines of division. ARISTOTLE, POLITICS, book VI, c. xiv.

⁴ See STORY, COMMENTARIES ON THE CONSTITUTION, § 518 *et seq.* (1833); GODKIN, THE CONSTITUTION AND ITS DEFECTS, 99 NORTH AMERICAN REV. 117 (1864).

⁵ See WOODROW WILSON, CONGRESSIONAL GOVERNMENT, 5 (1885).

⁶ See A. LAWRENCE LOWELL, CONSTITUTION AND MINISTERIAL RESPONSIBILITY, 57 ATLANTIC MONTHLY 180 (1886); DAVIS, RELATIONS OF THE THREE DEPARTMENTS OF THE UNITED STATES, 3 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE, 467 (1885).

⁷ See GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, Book I, Chap. III; FORD, 49 SCRIBNER'S MAGAZINE, 54; W. L. WILSON, PROCEEDINGS OF NEW YORK STATE BAR ASSOCIATION, 1897, p. 22. *Contra*, LOWELL, ESSAYS ON GOVERNMENT, 58.

It is interesting to note that the two keenest English critics of our government, Bagehot and Bryce, have strongly disapproved of the American division of powers. BAGEHOT, ENGLISH CONSTITUTION, 296; BRYCE, AMERICAN COMMONWEALTH, Ch. XXVI. The two latest Presidents of the United States have both advocated a closer coordination of the executive and legislative departments. W. H. TAFT, CONGRESSIONAL RECORD, Jan. 3, 1913; WOODROW WILSON, 57 ATLANTIC MONTHLY, 542. The Constitution of the Confederacy gave the cabinet officers seats in the legislature. See 3 JOHNS HOPKINS UNIVERSITY STUDIES, 481.

⁸ To-day probably even the advocates of the old division of powers would admit that it is more accurate to speak of the three manifestations of the one sovereign power. See BONDY, THE SEPARATION OF GOVERNMENTAL POWERS, 5 COL. UNIV. STUDIES IN HISTORY AND ECONOMICS, 16.

⁹ VERMONT CONSTITUTION, Ch. II, § 6; ILLINOIS CONSTITUTION, Art. III.

¹⁰ *In re Hayburn*, 2 Dall. (U. S.) 409. See also *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 480. It is to be observed that the federal Constitution contains no limitation whatever on the distribution of powers by the state governments unless the due process clause shall be considered applicable. See *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 552, 28 Sup. Ct. Rep. 178, 181. But see 27 POL. SCI. Q. 216.

¹¹ See *Brown v. Turner*, 70 N. C. 93, 102; *France v. State*, 57 Oh. St. 1, 17, 47 N. E. 1041, 1043.

courts to limit the merger of powers at some point undefined by the Constitution.

An easy but indefensible solution was to hold that the prohibition only extended to the placing of all the power of one department in the hands of another department.¹² In general, however, the courts have chosen a different path. They have allowed administrative boards to make reasonable regulations for water companies,¹³ gas companies,¹⁴ public health,¹⁵ and conduct of schools,¹⁶ and to fix fees within defined limits,¹⁷ acts which on any proper analysis would seem to be legislative in character. But they have refused to permit an executive board to create an office,¹⁸ fix a standard insurance policy,¹⁹ define a crime²⁰ or a penalty,²¹ or fix a license tax.²² A late Vermont case sanctioned a blending of certain legislative and judicial powers in an administrative railroad commission.²³ *Sabre v. Rutland R. Co.*, 85 Atl. 693 (Vt.). On the other hand the Illinois court refused to allow a civil service commission to appoint a probation officer, insisting that the freedom of the judicial department depends on its appointing its own officers. *Witter v. County Commissioners of Cook County*, 45 Chic. Leg. N. 194 (Ill., Sup. Ct., Dec. 1912). This decision is perhaps wise but seems inconsistent with decisions which have sustained statutes authorizing a judge to appoint purely ministerial officers such as police commissioners,²⁴ election commissioners,²⁵ park commissioners,²⁶ railroad directors,²⁷ and tax-collectors.²⁸ Occasionally the courts have been called upon to prevent the usurpation of judicial functions by the legislature.²⁹ This practice, rather common in colonial days, was later only checked by a considerable struggle.³⁰

¹² But see *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 601, 27 N. E. 217, 226.

¹³ *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

¹⁴ *Trustees of the Village of Saratoga Springs v. Saratoga Gas, Electric Light, and Power Co.*, 191 N. Y. 123, 83 N. E. 693.

¹⁵ *Pierce v. Doolittle*, 130 Ia. 333, 106 N. W. 751.

¹⁶ *State ex rel. School District No. 1 v. Andrae*, 216 Mo. 617, 116 S. W. 561.

¹⁷ *Merchants' Exchange of St. Louis v. Knott*, 212 Mo. 616, 111 S. W. 565. All of these cases also involve the distinct question of the delegation of legislative power.

¹⁸ *State v. Butler*, 105 Me. 91, 73 Atl. 560.

¹⁹ *Dowling v. Lancashire Insurance Co.*, 92 Wis. 63, 65 N. W. 738.

²⁰ *United States v. Mathews*, 146 Fed. 306.

²¹ *Board of Harbor Commissioners v. Excelsior Redwood Co.*, 88 Cal. 491, 26 Pac. 375.

²² *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 55 S. W. 627.

²³ *Accord*, *Southern Ry. Co. v. Railroad Commission of Indiana*, 42 Ind. App. 90, 83 N. E. 721; *Minneapolis, St. P., & S. S. M. Ry. Co. v. Railroad Commission of Wisconsin*, 136 Wis. 146, 116 N. W. 905. These were cases of a commission fixing rates after a proper hearing.

²⁴ *Fox v. McDonald*, 101 Ala. 51, 13 So. 416.

²⁵ *Russell v. Cooley*, 69 Ga. 215. *Contra*, *Case of Supervisors of Election*, 114 Mass. 247; and see note to *Hayburn's Case*, 2 Dall. (U. S.) 409.

²⁶ *People ex rel. Dunham v. Morgan*, 90 Ill. 558.

²⁷ *Walker v. Cincinnati*, 21 Oh. St. 14.

²⁸ *Hoke v. Field*, 10 Bush (Ky.) 144. It seems specious to distinguish as the court apparently did here between a delegation of power to an officer and to a person holding an office.

²⁹ *Ashuelot R. Co. v. Elliot*, 58 N. H. 451 (foreclosure of mortgage); *Edwards v. Pope*, 4 Ill. 465 (giving widow dower); *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 625 (dissolving corporation).

³⁰ For a collection of numerous cases of the provincial legislature in Massachusetts acting as a court see 15 HARV. L. REV. 208. For an account of the Rhode Island controversy, over the legislature's right to reverse a judicial decree for specific performance see 22 MONTHLY LAW REP. 65.

The courts seem to have performed consistently their clear though often difficult duty of maintaining the spirit if not the form of our government by checking the more flagrant and unnecessary instances of confusion of powers while allowing the mixture of powers where, as is frequently the case in the administrative department,³¹ it is peculiarly necessary. It seems probable that in the future a growing conception of what is peculiarly necessary will prevent the constitutional requirement of a division of powers from proving a serious check on the gradual development of administrative commissions, and closer coöperation between the departments. But any more radical changes in government must be sought by amendment. The American system of government was designed chiefly to secure a maximum of individual freedom. It is for the student of political science to accommodate that system to an increasingly paternal government which naturally inclines toward the efficiency³² of an administrative or commission government.

EFFECT OF AN OPTIONAL CONTRACT TO BUY LAND. — There are three types of contracts by which an option to buy land may be given to a prospective purchaser. The vendor in return for a consideration paid may promise to convey the land on tender of the price within a specified time.¹ This is a unilateral agreement analogous to a life-insurance contract. Secondly, the vendor may make an offer to sell for a given price and a unilateral contract to hold this offer open for a specified time.² The unilateral contract will be specifically enforced since damages at law are inadequate, and, as the purchaser has paid his consideration, no objection can be made on the ground of mutuality.³ When the option is exercised a bilateral contract for the sale of the land arises. Thirdly, the vendor may make an irrevocable offer to sell for a definite price within a fixed time. In some states an offer under seal has this effect.⁴ Here as in the second case, a bilateral contract arises upon the acceptance of the offer. In each case, however, the purchaser has a right to specific performance of the contract and cannot be refused the land on performing or

³¹ See decisions on this point collected in 66 CENT. L. J. 24.

³² It is sometimes said that the division of powers was intended to enhance the efficiency of government. See 20 YALE L. J. 88. This seems to contradict the entire purpose of the framers of the Constitution, which was not to avoid friction but through the friction of the departments to save the people from tyranny. See citation *supra*, notes 1, 2. Certainly in practice the system of checks has not contributed to efficiency. See BRYCE, AMERICAN COMMONWEALTH, Chap. xxvi.

¹ Cf. *Borel v. Mead*, 3 N. M. 84, 2 Pac. 222. See an article by Professor Langdell in 18 HARV. L. REV. 1, 11. It is to be observed that in this class of cases there is no obligation on the purchaser to perform even after he has given the vendor notice of his intention to do so. Hence courts are inclined to find that the parties made a contract of the second or third type. See 18 HARV. L. REV. 457.

² *Ross v. Parks*, 93 Ala. 153, 8 So. 368; *Brown v. Slee*, 103 U. S. 828; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

³ *Guy v. Warren*, 175 Ill. 328, 51 N. E. 581. Even when the vendor has simply given a first refusal and is not bound to sell to the holder of the refusal equity will enjoin him from selling to anyone else. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37.

⁴ *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *McMillan v. Ames*, 33 Minn. 257, 22 N. W. 612.

offering to perform the necessary conditions precedent. Since the creation of equitable estates is a generally recognized consequence of the right to specific performance, it would seem that in all three cases a springing use, *i. e.*, a contingent equitable interest in the land analogous to an executory devise, arises on the giving of the option. On this theory it has been held that an option exercisable beyond the period allowed by the rule against perpetuities cannot be specifically enforced against a purchaser of the land,⁵ even though damages for breach of the contract may be recovered at law from the vendor.⁶ On this theory, also, several decisions,⁷ including a recent North Dakota case, holding that an option contract may be enforced against an intervening donee or purchaser with notice can be explained. *Horgan v. Russell*, 140 N. W. 99 (N. D.). For an equitable interest in the land cannot be destroyed by a conveyance of the fee to anyone but a *bonâ fide* purchaser for value without notice. Most cases of this type, it is true, might also be explained on the doctrine that equity regards it as unconscionable for a donee or purchaser with notice to hold property to which a third party has a contract right for any other purpose than to carry out the contract.⁸ But in England at least it has been held that a contract which creates no equitable interest in the land is not specifically enforceable against a purchaser with notice,⁹ even though a decree would have been granted against the original obligor.¹⁰ Hence the first theory seems the more satisfactory. The cases¹¹

⁵ *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562; *Woodall v. Clifton*, [1905] 2 Ch. 257. *Cf.* *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352. Since equity would refuse to enforce specifically an option after an unreasonable time had elapsed, there is no need for this restriction in the policy behind the rule. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. *Cf.* *Stone v. Harman*, 31 Minn. 512, 19 N. W. 88. It can be explained only on the ground that equitable interests are actually created which infringe the letter of the rule.

⁶ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532. Moreover it will be specifically enforced as the personal covenant of a vendor still owning the land, even though it is a corporation having perpetual existence. *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers, Ltd.*, [1910] 1 Ch. 12. If the application of the rule to such equitable interests rested on the ground that they offend the spirit of the rule, it would seem that the legal contract should be declared void, for it does tend to make the vendor convey no matter how long a time has elapsed.

⁷ *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N. E. 544; *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539; *Kerr v. Day*, 14 Pa. St. 112; *Smith v. Bingham*, 156 Cal. 359, 104 Pac. 689.

⁸ Where the intervening purchaser intentionally interferes with the contract a tort is committed. *Lumley v. Gye*, 2 E. & B. 216. For this it would seem specific reparation might be decreed where as in the case of a contract to keep open an offer to sell land, the legal remedies were inadequate. But a donee or a negligently intermeddling purchaser could not be held on this ground.

⁹ *Martin v. Martin*, 2 Russ. & M. 507; *Norton v. Florence etc. Co.*, 7 Ch. D. 332; *Hicks v. Powell*, L. R. 4 Ch. 741; *Norris v. Chambers*, 29 Beav. 246; *aff'd* 2 De G., F. & J. 583. In the last case a vendor contracted to convey Prussian land to the plaintiff. By Prussian law such a contract created no equitable interest in the land. The vendor conveyed to the defendant, who took with notice. The plaintiff brought a bill for specific performance against the vendor and defendant. All parties were subject to the jurisdiction of the English court of chancery. Yet specific performance was refused.

¹⁰ *Ex parte Pollard*, Mont. & C. 239. *Cf.* *Lord Cranstown v. Johnston*, 3 Ves. 170. In the former case a contract to give a mortgage on Scottish land was specifically enforced against the mortgagor's trustee in bankruptcy, although by Scotch law the contract created no equitable interest in the land.

¹¹ *Gustin v. Union School District*, 94 Mich. 502, 54 N. W. 156; *In re Adams*, 27 Ch. D. 394.

holding that on the death of a lessee having an option to purchase the fee, his executor succeeds to the option may likewise be reconciled with this doctrine. For the contingency on which the springing use can vest is limited to the life of the purchaser, since the legal promise is to convey only at the option of the purchaser himself, and the possibility of specific performance of the contract is, strictly speaking, terminated at his death. But the law creates a new legal obligation between the vendor and the purchaser's executor, and since it is of the kind equity will specifically enforce a new equitable interest arises in the executor.¹²

JURISDICTION OVER FOREIGN CORPORATIONS THAT HAVE CEASED TO DO BUSINESS IN THE STATE. — A foreign corporation, not being a resident,¹ and being incapable of actual personal service within the state,² can be served only constructively by consent.³ Such consent is almost universally obtained to-day by legislation.⁴ The statute may actually require as a condition precedent to the doing of business within the state an express consent accompanied by the designation of an agent to receive process in behalf of the corporation.⁵ Or consent may be obtained from the fact that the corporation, with full knowledge of a statute providing that any corporation which does business in the state consents to receive service, engaged in business which without such consent would be illegal.⁶

A question which frequently arises under such statutes is whether a foreign corporation which has done business in the state but has withdrawn is amenable to process served upon its agent in the state. The answer must depend chiefly on the proper interpretation of the statute involved. If the legislature has been sufficiently careful to declare that the authority of the designated agent cannot be withdrawn under certain conditions, a revocation under the conditions stated is invalid.⁷ If, on the other hand, the statute expressly confines the authority of the agent to the time during which the corporation is doing business in the state, it is equally clear that the cessation of business by the corporation deprives the courts of jurisdiction.⁸ A more difficult problem is pre-

¹² If the interest vests during the life of the purchaser, however, equity, as in the case of a mortgage, will protect the heir from forfeiting the equitable fee on the death of the ancestor without obtaining the land, and will make the executor a constructive trustee of the contract, with a duty to pay the purchase price.

¹ *People v. Barker*, 141 N. Y. 118, 35 N. E. 1073; *Boston Investment Co. v. Boston*, 158 Mass. 461, 33 N. E. 580.

² *Middlebrooks v. Springfield Fire Ins. Co.*, 14 Conn. 301; *McQueen v. Middletown Mfg. Co.* 16 Johns. (N. Y.) 5. In some jurisdictions a foreign corporation doing business is considered "found" within the state for purposes of service of process without the aid of any principle of consent. *Hayden v. Androscoggin Mills*, 1 Fed. 93; *Williams v. East Tennessee, V., & G. Ry. Co.*, 90 Ga. 519, 16 S. E. 303.

³ But cf. *Newbry v. Von Coppen*, 7 Q. B. 293; *Libbey v. Hodgdon*, 9 N. H. 394.

⁴ For the statutory regulations in the individual states, see BEALE, *FOREIGN CORPORATIONS*, Chap. VII.

⁵ *Firemen's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488; *Reyer v. Odd Fellows' Accident Association*, 157 Mass. 367, 32 N. E. 469.

⁶ *St. Clair v. Cox*, 106 U. S. 350; *Walker v. Continental Ins. Co.*, 12 Utah 331.

⁷ *Home Benefit Society v. Muehl*, 22 Ky. L. Rep. 378, 59 S. W. 520; *McCord Lumber Co. v. Doyle*, 97 Fed. 22.

⁸ *Guthrie v. Connecticut Indemnity Association*, 101 Tenn. 643, 49 S. W. 829; *Swan*

sented when the matter is not expressly provided for in the statute. Such statutes may conveniently be divided into two classes: those which require the designation of some state official as agent to receive service, and those which permit the corporation to designate any individual it chooses. Where a statute of the former class is involved, the weight of authority is to the effect that cessation of business by the corporation does not revoke the agency.⁹ The theory underlying these decisions seems to be that the obvious purpose of the act was to provide a means for obtaining service of process on foreign companies which were no longer doing business in the state through agents on whom process might be served. For as long as a corporation has such agents in the state, there is no necessity for a right to serve process on an official.¹⁰ Even assuming the correctness of this line of decisions the reason on which they are based would not apply to cases involving statutes which do not require the designation of an official as agent. Accordingly, it has been generally believed that under such a statute an opposite conclusion would be reached.¹¹ A recent Indiana case, however, holds that in view of the principle which requires the purpose of the act to have a controlling influence in its construction, the proper interpretation of the statute demands that the attempted revocation be held inoperative. *Brown-Ketcham Iron Works v. Guy B. Swift Co.*, 100 N. E. 584 (Ind., App. Ct.). It is elementary that in statutes the intent is the essence of the law.¹² But it is equally well settled that the legislature must be understood to mean what it has plainly expressed.¹³ This rule should forbid not only the reading into the act of provisions inconsistent with its express terms, but also any implication for which a valid basis cannot be found in the words of the statute itself.¹⁴ Moreover, a decision opposed to the above case is rendered the more necessary by the well-established principle that, since jurisdiction over a foreign corporation depends entirely on statutes, a strict interpretation of the statute is required.¹⁵

2. *Mutual Reserve Fund Life Association*, 100 Fed. 922. So jurisdiction fails if the corporation has ceased to have an agent in the state who comes within the class of persons provided in the statute. *St. Clair v. Cox*, 106 U. S. 350.

⁹ *Home Benefit Society of New York v. Muehl*, 22 Ky. L. Rep. 1378, 59 S. W. 520. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707.

¹⁰ See *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147, 157. This reason, however, has not been regarded of sufficient weight by some courts to justify them in reading such a provision into the act. *Swann v. Mutual Reserve Fund Life Association*, 100 Fed. 922; *Freedman v. Empire Life Ins. Co.*, 101 Fed. 535.

¹¹ *Forrest v. Pittsburgh Bridge Co.*, 116 Fed. 357. See BEALE, FOREIGN CORPORATIONS, § 281.

¹² *Phillips v. Pope's Heirs*, 10 B. Mon. 172 (Ky.); *Winston v. Kimball*, 25 Me. 493.

¹³ *United States v. Hartwell*, 6 Wall. 395; *Denn v. Reid*, 10 Pet. 524. See SUTHERLAND, STATUTORY CONSTRUCTION, § 238.

¹⁴ "When any corporation organized under the laws of any foreign state . . . desires admission into the state of Indiana, for the purpose of transacting business . . . it shall make application stating the name and address of some agent or attorney in fact upon whom service of process can be had in all suits commenced in this state." *Burns Ann. Stat.*, 1908, s. 4086.

¹⁵ *Southern Building and Loan Association v. Hallum*, 59 Ark. 583, 28 S. W. 420; *Loukey v. Keyes Silver Mining Co.*, 21 Nev. 312, 31 Pac. 57.

CORRECTION. — Attention is called to an error in the May issue in the use of the term "children *en ventres ses mères*," on pages 638 and 639. The form which has been used by the courts is "children *en ventre sa mère*."

RECENT CASES.

ADMIRALTY — TORTS — RECOGNITION OF STATE LAW AS TO LIABILITY OF COUNTY. — The ship of the libelants was injured by the negligence of the servants of the respondent county in operating a drawbridge over a navigable stream. By the common law of the state in which the accident occurred a governmental agency was not liable for the negligence of its servants. *Held*, that the county is liable under the general maritime law. *O'Keefe v. Staples Coal Co.*, 201 Fed. 131 (Dist. Ct., D. Mass.).

A suit in the state court under the facts of the principal case would have brought the opposite decision. *French v. Boston*, 129 Mass. 592. The same anomaly of rights varying with the court appears in the defense of contributory negligence. *Cf. The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29; *Garoni v. Compagnie Nationale de Navigation*, 131 N. Y. 614, 14 N. Y. Supp. 797. The federal government was given exclusive jurisdiction of admiralty in the interest of uniform laws. See *The Roanoke*, 189 U. S. 185, 198, 23 Sup. Ct. 491, 494; *The Chusan*, 5 Fed. Cas., No. 2,717. But this does not prevent admiralty, if it chooses, from recognizing affirmative rights given under state statutes. So admiralty has recognized a state statute allowing an action for death by wrongful act. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133. It has also recognized a state statute giving a lien for supplies in the home port although the rights of priority were held to be governed by admiralty law. *The Edith*, 94 U. S. 518; *Peyroux v. Howard*, 7 Pet. (U. S.) 324. In other cases the court has rejected state statutes as inconsistent with the principles of admiralty. *The Roanoke*, 189 U. S. 185, 23 Sup. Ct. 491; *The Key City*, 14 Wall. (U. S.) 653. And the principal case follows a prior decision in refusing to recognize the state common law. *Workman v. New York*, 179 U. S. 552, 21 Sup. Ct. 212. Whether or not a particular state statute will be given effect in a court of admiralty sitting in the state seems to depend on no more definite principle than the character of the statute. But it seems unlikely that admiralty courts will adopt local common-law rules without legislation by Congress.

BAILMENTS — NATURE OF BAILMENTS — LIABILITY OF RESTAURANT KEEPER FOR GUEST'S OVERCOAT. — The plaintiff, a guest in the defendant's restaurant, hung his overcoat on a hook provided for the purpose a few feet from his table. When the plaintiff prepared to depart the coat had disappeared. *Held*, that the defendant is liable. *Wentworth v. Riggs*, 139 N. Y. Supp. 1082 (Sup. Ct., App. Div.).

The restaurant keeper, unless there is a bailment, owes merely a duty of reasonable supervision for guests' belongings, founded on the usual obligation to protect invitees from foreseeable dangers. *Simpson v. Rourke*, 13 N. Y. Misc. 230, 34 N. Y. Supp. 11. But if the defendant is a bailee, as the court in the principal case considered him, he must take due care to protect the particular chattel. To establish a bailment, possession must be consciously relinquished by the bailor and assumed by the bailee. For, except where the relationship is imposed by law, as in the case of finders, the obligation is based on an express or implied agreement. See *Mariner v. Smith*, 5 Heisk. (Tenn.) 203, 206; *First National Bank v. Ocean National Bank*, 60 N. Y. 278, 284. In the absence of an actual delivery, the discussion in the principal case seems to be mainly as to whether an invitation to or acquiescence in a bailment by the restaurant keeper may be implied. *Cf. Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910. A more serious objection to the existence of a bailment, however, would seem to be the difficulty in implying the consent of the guest to yielding possession.

In the absence of a special agreement, a bailee, since he has exclusive possession, is entitled to move the object bailed. *Atlantic Coast Line R. Co. v. Baker*, 118 Ga. 809, 45 S. E. 673. The ordinary restaurant guest who hangs his overcoat a few feet from his table is probably unwilling that it be carried away and locked up till called for.

BANKRUPTCY — DISCHARGE — JUDGMENT FOR ALIMONY. — A judgment was obtained in New York founded upon a North Dakota judgment for alimony. Thereafter, the person against whom the judgment was rendered became bankrupt and obtained a discharge. *Held*, that the judgment is nevertheless enforceable. *Matter of Estate of Williams*, 49 N. Y. L. J. 171 (N. Y., Ct. App.).

For a criticism of the contrary holding in the same case in a court below, see 23 HARV. L. REV. 146.

BANKRUPTCY — DISSOLUTION OF LIENS — LIENS "VOID" BY SECTION 67f MERELY VOIDABLE BY TRUSTEE. — A creditor obtained a judgment lien on the property of an insolvent within four months of his bankruptcy. Section 67f of the Bankruptcy Act provides that such liens shall be deemed void and that the property affected thereby shall pass to the trustee. The trustee elected not to take the property. *Held*, that the lien may be enforced notwithstanding the bankrupt's discharge. *McCarty v. Light*, 139 N. Y. Supp. 853 (Sup. Ct., App. Div.).

Section 67f of the Bankruptcy Act was obviously enacted for the benefit of the trustee as the representative of all the creditors and not for the benefit of the bankrupt. Consequently, it is well settled as a matter of construction that the liens referred to in that section are only voidable at the option of the trustee. Hence neither the bankrupt himself nor outsiders can set up the automatic operation of the section. *Rochester Lumber Co. v. Locke*, 72 N. H. 22, 54 Atl. 705; *Frazee v. Nelson*, 179 Mass. 456, 61 N. E. 40; *Hutchins v. Canlu*, 66 S. W. 138 (Tex.). For the same reason, the section has been construed as not applying to liens on exempt property. *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433. But! see *In re Tune*, 115 Fed. 906. A further analogy is found in dealing with the Statute of Elizabeth. Notwithstanding its broad language declaring all transfers of property in fraud of creditors void, it is firmly established that such transfers are merely voidable at the option of those persons for whose benefit the statute was enacted. *Burgett's Lessee v. Burgett*, 1 Ham. (1 Oh.) 469; *Doster v. Manistee National Bank*, 67 Ark. 325, 55 S. W. 137. The same principle is followed in construing conditions in leases. *Smith v. Sinclair*, 59 N. J. L. 84, 34 Atl. 943; *Bowman v. Foot*, 29 Conn. 331. Cf. *Trask v. Wheeler*, 7 Allen (Mass.) 109.

CARRIERS — LIMITATION OF LIABILITY — EFFECT OF DEVIATION BY CARRIER UPON CONTRACT FOR AGREED VALUATION. — The plaintiff shipped livestock over the defendant railroad under a special contract, excusing the defendant from liability as an insurer under certain circumstances and providing for an agreed valuation of the stock per head in case of loss. The railroad carried the shipment by a different route from that ordered. Part of the livestock was destroyed. *Held*, that the plaintiff may recover the proven, instead of the agreed, value. *Atlantic Coast Line R. Co. v. Hinely-Stephens Co.*, 60 So. 749 (Fla.).

By special contract a carrier may obtain exemptions from his usual liability as insurer. *Grace v. Adams*, 100 Mass. 505; *Anchor Line v. Dater*, 68 Ill. 369. Also by an agreed valuation of the goods shipped he may fix the maximum recovery of the shipper in case of loss. *Hart v. Pennsylvania R.*, 112 U. S. 331, 5 Sup. Ct. 151; *Graves v. Lake Shore & M. S. R.*, 137 Mass. 33. *Contra*, *Moulton v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 85, 16 N. W. 497. That a de-

viating carrier loses the benefits of a contract limiting liability as insurer is well settled. *Robertson v. National S. S. Co.*, 60 N. Y. Super. Ct. 132, 14 N. Y. Supp. 313; *Galveston, H. & H. Ry. Co. v. Allison*, 59 Tex. 193. But no American cases have been found discussing the effect of deviation where an agreed valuation is part of the contract. A few decisions hold the deviating carrier a converter and consequently liable for the full value of the goods in trover. *Phillips v. Brigham*, 26 Ga. 617. But this view of deviation seems incorrect. *Southern Pac. Co. v. Booth*, 39 S. W. 585 (Tex. Civ. App.). See 2 HUTCHINSON, CARRIERS, 3 ed., § 621. The result of the principal case, however, finds support in England on the ground that an unwarranted deviation is a substantial breach of the special contract which prevents the carrier from asserting any right under it. *Balian v. Joly, Victoria & Co.*, 6 T. L. R. 345. Cf. *Thorley v. Orchis Steamship Co.*, [1907] 1 K. B. 660; *Kish v. Taylor*, [1912] A. C. 604. The elimination of the special contract remits the parties to the ordinary common-law rights and duties of the relation of carrier and shipper. It seems that this should be true whether the special contract provides for exemption or agreed valuation.

CONFLICT OF LAWS — ASSIGNMENT OF CONTRACTS — INDORSEMENT OF INSTRUMENT, NON-NEGOTIABLE IN PLACE OF CONTRACTING, AT A PLACE WHERE SUCH INSTRUMENTS ARE NEGOTIABLE. — A bill of lading issued in England was indorsed for a special purpose in Massachusetts and transferred by the indorsee to the plaintiff, a *bonâ fide* purchaser. By the English law, such a transfer gives no right in the goods except for the special purpose. By the law of Massachusetts the *bonâ fide* purchaser obtains a perfect title. The defendant, the original holder of the bill, obtained the goods from the carrier. Held, that the plaintiff can recover in trover. *Roland M. Baker Co. v. Brown*, 100 N. E. 1025 (Mass.).

The authorities are divided as to what law governs the negotiability of an instrument. In some jurisdictions the law of the place of performance governs. *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775. Since the question relates to the nature of the obligation assumed by the obligor, the correct view would seem to be that it is for the *lex loci contractus*. This view is taken in some jurisdictions. *Havenstein v. Barnes*, 5 Dill. (U. S.) 482; *De La Chaumette v. Bank of England*, 2 B. & A. 385; *Lebel v. Tucker*, L. R. 3 C. B. 77. This is clear where the same place is named for payment. *Cope v. Darrell*, 9 Dana (Ky.) 415; *Coburn v. Planter's National Bank*, 87 Va. 661, 13 S. E. 98. Or where there is no other place of payment expressed. *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530; *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. 444. But where, as in the principal case, the dispute arises between successive holders of the bill of lading, different considerations arise. The question is as to the effect which the transfer of the bill of lading has on the title to the goods, and the law of the place where the act of transfer takes place is the proper law to determine its validity. *Alcock v. Smith*, [1892] 1 Ch. 238.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — ADMINISTRATIVE BODY WITH LEGISLATIVE AND JUDICIAL POWERS. — By statute a railroad commission was given power to hold judicial hearings and legislative powers to make regulations. The constitution provided that "the legislative, executive, and judiciary departments shall be separate and distinct so that neither shall exercise the powers properly belonging to the other." Held, that the statute does not result in an unconstitutional distribution of the powers of government. *Sabre v. Rulland R. Co.*, 85 Atl. 693 (Vt.). See NOTES, p. 744.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXECUTIVE APPOINTMENT OF SUBORDINATE JUDICIAL OFFICERS. — By statute the board of county

commissioners was given power to appoint and discharge the probation officer of the county court. The constitution provided that no person composing one of the three departments should exercise any power properly belonging to either of the others. *Held*, that the statute is unconstitutional, since it is a delegation of a judicial power to an administrative board. *Witter v. County Commissioners of Cook County*, 45 Chic. Leg. N. 194 (Ill., Sup. Ct., Dec., 1912). See NOTES, p. 744.

CONSTITUTIONAL LAW — TRIAL BY JURY — VALIDITY OF STATUTE ALLOWING CHANGE OF VENUE UPON APPLICATION BY PROSECUTOR. — A state constitution provided that the right of trial by jury should remain. A statute allowed circuit courts, upon good cause shown, to change the venue in any causes pending before them. On the application of the prosecution, a circuit court made an order changing the venue in a criminal case. The accused thereupon brought mandamus to compel a vacation of the order. *Held*, that the writ will issue. *Glinnan v. Phelan*, 140 N. W. 87 (Mich.).

Two of the four judges composing the majority reached their conclusions on the ground that the statute was unconstitutional, though a majority of the court thought otherwise. The question turns on what the right of the accused was at common law, for this the constitution guarantees him. At common law, upon a writ of *certiorari*, there was a discretionary power to change the venue at the defendant's request, if he showed that a fair trial was impossible in the district where the crime occurred. *King v. Hunt*, 3 B. & Ald. 444. See *People v. Vermilyea*, 7 Cow. (N. Y.) 108. By the better view changes were also granted upon the same ground on the prosecutor's application. *Regina v. Barrett*, Ir. R. 4 C. L. 285. See *Barry v. Truax*, 13 N. D. 131, 141, 99 N. W. 769, 772. But see *People v. Powell*, 87 Cal. 348, 25 Pac. 481. The common-law right guaranteed by the state constitution was therefore only a conditional right to be tried in the county where the crime was committed. Hence the statute in the principal case is not unconstitutional. *People v. Peterson*, 93 Mich. 27, 52 N. W. 1039; *Barry v. Truax*, *supra*. This reasoning would seem to apply even where the constitution expressly provides for a trial in the county or district where the crime occurs, for this is the broad common-law rule, into which the common-law exception should be read. The slight weight of authority is, however, opposed to this view. *Wheeler v. State*, 24 Wis. 52; *In re Nelson*, 19 S. D. 214, 102 N. W. 885. *Contra*, *State v. Miller*, 15 Minn. 344; *Hewitt v. State*, 43 Fla. 194, 30 So. 795.

CONSTITUTIONAL LAW — TRIAL BY JURY — WHETHER APPELLATE COURT CAN REVERSE A JUDGMENT RENDERED ON A VERDICT. — The plaintiff sued the defendant company on an insurance policy. After the evidence was in, the defendant requested a verdict in its favor. The request was refused and the jury found in favor of the plaintiff. The defendant moved for judgment notwithstanding the verdict. The motion was refused, but on writ of error the Circuit Court of Appeals, finding that there was not sufficient evidence to send the plaintiff's case to the jury, entered judgment for the defendant. *Held*, that the Circuit Court of Appeals should have ordered a new trial, but the entering of judgment for the defendant was in violation of the Seventh Amendment, providing that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." *Slocum v. New York Life Ins. Co.*, 33 Sup. Ct. 523. See NOTES, p. 738.

CORPORATIONS — CAPITAL, STOCK, AND DIVIDENDS — SITUS OF STOCK AT DOMICILE OF CORPORATION. — A testator who died domiciled in Alabama owned stock in a Mississippi corporation. By Mississippi law all the property in that state is distributed according to Mississippi law and not that of the

domicile of the deceased. By Mississippi law the stock was liable to the claims of creditors while by Alabama law it was exempt. *Held*, that Mississippi law applies. *Jane v. Martinez*, 61 So. 177 (Miss.).

For a discussion of the principles involved see 25 HARV. L. REV. 719.

COVENANTS OF TITLE — COVENANT OF WARRANTY — MEASURE OF WARRANTOR'S LIABILITY. — The vendor in a contract to sell land, at the request of the vendee, conveyed by warranty deed directly to the subvendee. The vendor's title proved defective. After the paramount owner had recovered against the subvendee, the subvendee sued the original vendor for breach of warranty. *Held*, that the damages are limited to the purchase price received from the original vendee. *Hunt v. Hay*, 49 N. Y. L. J. 263 (Sup. Ct., App. Div.).

The ancient real warranty, originating when land was not marketable, was substantially a promise to give other equally good land. See SEDGWICK, DAMAGES, 9 ed., § 952; CO. LIT. § 365. The consideration paid and recited was later treated as agreed liquidated damages to take the place of specific performance. See SEDGWICK, DAMAGES, 9 ed., § 951. New York has followed the analogy in dealing with modern covenants of quiet enjoyment. *Staats v. Ten Eyck*, 3 Caines (N. Y.) 111. Neither the rise in market value of the land nor improvements by the grantee before the breach are considered. *Pitcher v. Livingston*, 4 Johns. (N. Y.) 1. The argument in favor of the rule seems confined to the possibility of hardship on an innocent grantor in case of extraordinary appreciation, especially since the covenant runs with the land. See *Willson v. Willson*, 25 N. H. 229, 238. But if the grantor chooses to covenant, the grantee or subgrantee building in reliance thereon should not suffer. Moreover, to hold the consideration recited as conclusive of the price paid, as is sometimes done in cases of subgrantees, is contrary to fact. *Greenwault v. Davis*, 4 Hill, (N. Y.) 643; *Cook v. Curtis*, 68 Mich. 611, 36 N. W. 692. The usual theory of damages in chattel warranties is to require the warrantor to put the warrantee in the same position at the time of the breach as if the promise had been complied with. *Cary v. Gruman*, 4 Hill (N. Y.) 625. In the principal case the actual value of the land at the time of the eviction, of which the price paid by the subvendee may be considered *prima facie* evidence, seems a more just assessment. *Bunny v. Hopkinson*, 27 Beav. 565; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749; *Hardy v. Nelson*, 27 Me. 525. Under the New York rule the test seems to be the value of the land at the time of the original covenant. Even with this test, where, as in the principal case, the covenant is made directly to the subgrantee, the price paid by the latter at that time would seem to be a more logical measure of damages than that paid several months before by the original purchaser. *Cf. Graham v. Leslie*, 4 U. C. C. P. 176.

EVIDENCE — DECLARATIONS AGAINST INTEREST — WHETHER CONFESSION OF CRIME IS SUFFICIENT. — The defendant, on trial for murder, offered in evidence a confession of a third party, now dead, that he had committed the murder. *Held*, that the evidence is not admissible. *Donnelly v. United States*, 228 U. S. 243, 33 Sup. Ct. 449.

Three justices dissent on the ground that the evidence was within the exception to the hearsay rule admitting a declaration against interest, although the interest was not of a pecuniary nature. *Coleman v. Frazier*, 4 Rich. L. (S. C.) 146; 2 WIGMORE, EVIDENCE, §§ 1476-77. The English cases do not consider penal interest sufficient. *Sussex Peerage*, 11 Cl. & F. 85. The American cases also support the majority opinion, though the courts generally have not considered the possibility of admitting the evidence as a declaration against interest. *State v. Fletcher*, 24 Or. 295, 33 Pac. 575; *State v. West*, 45 La. Ann. 928, 13 So. 173; *People v. Hall*, 94 Cal. 595, 30 Pac. 7. As is illustrated by the

principal case, which is the first expression of the Supreme Court upon this point, it would be difficult to change the common-law requirement as to pecuniary interest. On principle, however, admissions of criminal liability are really against a man's pecuniary interest, unless, as here and in many of the decided cases, the declaration is made just before death. The pecuniary loss is clear if the punishment be by fine; and certainly imprisonment will deprive a man of the opportunity to earn anything while imprisoned and perhaps impair his chances afterward. The general attitude of the courts, however, toward extending any of the hearsay exceptions is one of disfavor due to their distrust of easily manufactured hearsay evidence.

FOREIGN CORPORATIONS — SERVICE OF PROCESS — REVOCATION OF AUTHORITY OF AGENT APPOINTED TO RECEIVE SERVICE OF PROCESS IN COMPLIANCE WITH STATUTE. — A statute required foreign corporations before doing business in the state to designate an agent upon whom service of process might be had. The defendant corporation, having complied with the statute, made a contract with the plaintiff and thereafter ceased doing business in the state. In a suit on the contract, it averred that it had revoked the agent's authority to receive process. *Held*, that the revocation was ineffectual. *Brown-Ketcham Iron Works v. George B. Swift Co.*, 100 N. E. 584. (Ind., App. Ct.) See NOTES, p. 749.

ILLEGAL CONTRACTS — EFFECT OF ILLEGALITY — WHETHER ILLEGALITY BARS RECOVERY FOR FRAUD. — With the object of defrauding the defendant of his property and then getting rid of him, the plaintiff aided him in procuring a divorce and married him. She thereby induced him to transfer a large part of his property to her. The marriage, being within one year after the divorce, was by statute felonious and void. The plaintiff filed a bill for annulment, whereupon the defendant brought a cross bill for restitution of the property. *Held*, that the cross bill should be dismissed. *Szlawzis v. Szlawzis*, 255 Ill. 314, 99 N. E. 640. See NOTES, p. 738.

INSURANCE — INSURABLE INTEREST — RELATIONSHIP IN LIFE INSURANCE. — The deceased insured his own life in favor of a married sister and later assigned the insurance policy to her. He owed her no duty of support nor did he actually give her financial aid. *Held*, that the proceeds of the policy should be paid to the sister. *Phillip's Estate*, 238 Pa. St. 423.

The court held that, even assuming the need of an insurable interest in the assignee, yet here the requirement was satisfied. Relationship with an expectation of some pecuniary advantage from the continued life of the relative constitutes an insurable interest. *Lord v. Dall*, 12 Mass. 115; *Geoffroy v. Gilbert*, 5 N. Y. App. Div. 98, 38 N. Y. Supp. 643. Relationship alone is sufficient according to the view of some courts because from it an expectation of pecuniary advantage may be presumed. See *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray (Mass.) 396, 399. Where the relationship is that of husband and wife, this pecuniary advantage is clear because of the wife's legal right to support and the husband's right to her services. *Gambs v. Covenant Mutual Life Ins. Co.*, 50 Mo. 44; *Currier v. Continental Life Ins. Co.*, 57 Vt. 496. But in most other relationships the advantage may be so uncertain that more definite evidence should be required to show an expectancy. *Guardian Mutual Life Ins. Co. of New York v. Hogan*, 80 Ill. 35; *Life Ins. Clearing Co. v. O'Neill*, 106 Fed. 800. It would seem the best policy always to require from the insurer a pecuniary interest in the life. A sentimental interest alone may in the great majority of cases prevent the contract being objectionable as a wager, and may provide an effective check to the temptation to kill the insured. But there is no sufficient advantage to society in allowing compensation for senti-

mental loss, as there is in a case where one insures his means of subsistence; and without such advantage the dangerous tendencies which must occasionally bring evil results seem sufficient to invalidate the policy. *Life Ins. Clearing Co. v. O'Neill*, *supra*. *Contra*, *Woods v. Woods' Adm'r*, 130 Ky. 162, 113 S. W. 79. See cases collected in RICHARDS, INSURANCE LAW, 3 ed., § 35; 1 MAY, INSURANCE, 4 ed., § 102 A-107 C.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — CONFLICT BETWEEN FEDERAL AND STATE POLICE REGULATIONS: SAFETY APPLIANCE LAWS. — A state statute required all locomotives used in the state to comply with certain specifications tending to promote the safety of travel, and for an elaborate system of inspection to enforce compliance. A subsequent federal statute embodied similar provisions for interstate locomotives, and differed only in details the enforcement of which would not render impossible enforcement of the state statute. *Held*, that the state statute is now invalid as to interstate commerce. *Louisville & Nashville R. Co. v. Hughes*, 201 Fed. 727 (Dist. Ct., S. D. Oh.).

The state statute was admittedly valid, when passed, as an exercise of police power in the absence of federal regulation. But the law seems to be that a federal statute which shows an intent to exclude all state police regulation of interstate commerce in a given field is effective in so doing, even though the state regulations are not inconsistent with those of Congress. *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 32 Sup. Ct. 160. In the principal case the intent of Congress to control completely one field of interstate commerce is made plain by the elaborateness of the federal statute. Moreover, although the two statutes could have been enforced simultaneously, the expense involved prohibits it as a matter of business expediency, and they should be held to be in direct conflict. See 26 HARV. L. REV. 78.

INTERSTATE COMMERCE — CONTROL BY STATES — CONFLICT BETWEEN FEDERAL AND STATE POLICE REGULATIONS: Pure Food Laws. — A state statute provided that a certain compound should not be sold under the label of "syrup." The defendants, retail merchants, were convicted under this statute. The goods in question were bought in another state and the label and package were unaltered. The label "syrup" was a proper one under the federal Pure Food Act, applying to goods in interstate commerce. *Held*, that the state statute is invalid as interfering with the operation of the federal Pure Food Act. *McDermott v. State of Wisconsin*, 33 Sup. Ct. 431.

For a discussion of the principles involved see 26 HARV. L. REV. 78.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — POWER TO ORDER EQUALIZATION OF INTRASTATE RATES WITH INTERSTATE RATES. — A state railroad commission fixed intrastate rates so low as to prevent commercial competition within the state by distributing centers just across the state line which had to ship under the reasonable interstate rates. The railroad acquiesced. The Interstate Commerce Commission ordered the railroad to equalize its interstate and intrastate rates in that section. *Held*, that Congress has the constitutional power to do this, and it has delegated that power to the Interstate Commerce Commission. *Texas & Pacific Ry. Co. v. United States*, U. S. Commerce Ct., April 25, 1913.

The court permitted the order because the state rates could be resisted by the railroad on the ground that they were unconstitutional in interfering with interstate commerce. The case thus presents a similar question to that involved in the State Railroad Rate Cases now before the Supreme Court. See *Shepard v. Northern Pacific Ry. Co.*, 184 Fed. 765; *St. Louis & S. F. Ry. Co. v. Hadley*, 168 Fed. 317. In deciding that the discriminatory intra-

state rates were void when Congress through the Interstate Commerce Commission had acted on the matter, the court did not expressly decide that those rates were unconstitutional without such regulation. But if the Interstate Commerce Act gives to the Commission the power to vary such rates this would seem to be such action by Congress as would exclude any state regulation previously permissible.

LANDLORD AND TENANT — RENT — CONSTRUCTIVE EVICTION AS DEFENSE TO ACTION FOR RENT. — The lessee of an apartment left before the end of the term because the stench from dead rats in the walls made the place untenable. In an action for rent for the remainder of the term, he pleaded these facts as amounting to a constructive eviction. *Held*, that this plea is a good defense. *Barnard Realty Co. v. Bonwit*, 139 N. Y. Supp. 1050 (Sup. Ct., App. Div.).

It is well settled that eviction discharges the duty to pay rent. *Sully v. Schmitt*, 147 N. Y. 248, 41 N. E. 514; *Bass v. Rollins*, 63 Minn. 226, 65 N. W. 348. But the cases seem confused as to what facts may constitute an eviction. Some courts have held that a breach of covenant by the landlord causing the premises to become untenable and the tenant to leave, will be sufficient. *Bass v. Rollins*, *supra*; *Lawrence v. Mycenian Marble Co.*, 1 N. Y. Misc. 105, 20 N. Y. Supp. 698. *Contra*, *Lunn v. Gage*, 37 Ill. 19. By others, however, it has been said that the tenant must leave because of affirmative acts by the landlord. See *Tiffany, Landlord and Tenant*, 1271; *Huber v. Ryan*, 26 N. Y. Misc. 428, 56 N. Y. Supp. 135. The better view would seem to be that if the landlord is under any duty in regard to the leased premises, the violation of which amounts to a tort, and a breach of this duty makes the premises untenable, there will be an eviction. *Alger v. Kennedy*, 49 Vt. 109; *Sully v. Schmitt*, *supra*. Without express provision otherwise the lessor of a house need make no repairs. *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 837; *Libbey v. Tolford*, 48 Me. 316. But when an apartment is leased, the view of the court in the principal case, that the space outside the inner walls is not included in the leasehold, seems reasonable, as the tenant cannot be considered as absolutely in control of all surrounding walls. It seems proper, therefore, that the duty to prevent rats within such walls from injuring the value of the leasehold should fall on the landlord; and his failure to repair resulting in a nuisance making the premises untenable, should constitute a tort amounting to an eviction. *Maddon v. Bullock*, 115 N. Y. Supp. 723.

LEGACIES AND DEVISES — ABATEMENT — LEGACY CONDITIONED ON RELINQUISHMENT OF CLAIMS AGAINST THIRD PARTIES. — The defendant was entitled to an annuity for life in a trust fund. The testator bequeathed money to the defendant on condition that she relinquish all such rights in favor of a charitable organization. The estate proved insufficient to satisfy all the general legacies. *Held*, that if she elects to take the legacy it is liable to abatement. *Whitehead v. Street*, Weekly Notes of Feb. 15, 1913, 40 (Eng., Ch. Div., 1913).

The usual rule is that, in the absence of funds to satisfy the general legacies, they all abate together, even though the widow is among such legatees and is otherwise unprovided for. *Blower v. Morrett*, 2 Ves. 419; *In re Schmeder's Estate*, [1891] 3 Ch. 44. *Contra*, *In re Hardy*, 17 Ch. D. 798. Courts and text-writers have repeatedly declared that wherever a legacy is given in lieu of dower or relinquishment of a claim, there is priority. See *Davies v. Bush*, Younge 341, 343; *Zaiser v. Lawley*, [1902] 2 Ch. 799, 807; *THEOBALD ON WILLS*, 6 ed., 810; *WILLIAMS ON EXECUTORS*, 10 ed., 1093. Such has been the law for over two hundred years as to legacies in lieu of dower. *Burridge v. Bradyl*, 1 P. Wms. 127. But in England there seems to be no direct authority allowing priority to the legatee where other claims are given up. See

In re Wedmore, [1907] 2 Ch. 277, 280; THEOBALD ON WILLS, 7 ed., 846. In the United States the two are treated alike. *Reynolds v. Reynolds*, 27 R. I. 520; *Wood v. Vandenburg*, 6 Paige (N. Y.) 277. If the intention of the testator was to grant a priority this intention should of course govern. See *Appeal of Trustees of University of Pennsylvania*, 97 Pa. St. 187, 200. In the absence of an expressed intent, cases where priority is allowed must be justified by the fiction of a presumed intent. Whether or not the relinquishment would inure to the benefit of the estate, it seems reasonable where the legacy is offered substantially as an equivalent for a right relinquished, to imply a desire to have this legacy paid in full even at the expense of the other legatees. This seems a more satisfactory view than arbitrarily to restrict the dower rule to its facts, as did the principal case. Of course, if the right were to a liquidated sum less than the legacy, the implication would not be justified. *In re Wedmore*, *supra*. But the principal case is not distinguishable in that way. An intent to give priority can reasonably be implied, it is submitted, wherever a testator conditions a legacy on the relinquishment of a right which is not obviously worth less than the legacy.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — WORDS ACTIONABLE PER SE. — The defendant published a sensational and improbable story which purported to be a narration by the plaintiff of a personal experience. The plaintiff, a famous author, lecturer, and explorer, had written no such story. In a suit for libel the defendant demurred to a complaint setting out these facts. *Held*, that the demurrer should be overruled. *D'Altomonte v. New York Herald Co.*, 139 N. Y. Supp. 200 (Sup. Ct., App. Div.).

It is well settled that to constitute libel there need be no direct statement about the plaintiff. *Archbold v. Sweet*, 5 Car. & P. 219; *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207. Nor is it necessary that the defendant intend any libel. *Curtis v. Mussey*, 6 Gray (Mass.) 261. The publication in the principal case would lead readers to believe that the plaintiff was a writer of stories of doubtful literary merit. *Cf. Archbold v. Sweet*, *supra*. Also, by attributing to the plaintiff the recounting of personal experiences which his associates would know had never happened, the publication imputes to the plaintiff the writing of falsehoods. Words are held to be defamatory if they would be so understood by a particular class of persons. *Martin v. The Picayune*, 115 La. 979, 40 So. 376; *Archbold v. Sweet*, *supra*. The principle generally adopted by the courts is that the question must be left to the jury if they might reasonably find that the publication was understood as defamatory. *Dennis v. Johnson*, 42 Minn. 301, 44 N. W. 68; *Martin v. The Picayune*, *supra*. In the principal case the jury might reasonably find that the plaintiff's reputation for truth and for being a person of real literary ability was injured among his associates by the publication.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — ESTOPPEL TO CHALLENGE VALIDITY OF ORDINANCE WHILE ENJOYING FRANCHISE UNDER IT. — A borough by ordinance granted the defendant's assignor the right to use the streets for gas on condition that they supply free gas to churches. The defendant refused to comply with the condition on the ground that the ordinance was void. *Held*, that the validity of the ordinance cannot be attacked by those enjoying a franchise under it. *Bellevue Borough v. Manufacturers' Light & Heat Co.*, 238 Pa. St. 388.

If the decision in the principal case is correct, it must be on the ground that since the defendant accepted benefits under the ordinance, it is now estopped to assert its invalidity. It is well settled that public policy prevents the estoppel of a municipal corporation to assert its own lack of power. *Ottawa v. Carey*, 108 U. S. 110; *McPherson v. Foster Bros.*, 43 Ia. 48. But a

city may be estopped from asserting irregularities in the exercise of a power as distinguished from entire absence of power. *Marcy v. Oswege*, 92 U. S. 637. And it is sometimes held that there is an estoppel against a municipal corporation when it has permitted long adverse user of public property and large expenditures thereon. *Paine Co. v. Oshkosh*, 89 Wis. 449. But see *London Bank v. Oakland*, 90 Fed. 691, 701. Even in the case of utter lack of capacity the only objection to estopping the city would seem to be the necessity of saving municipalities from the danger of the misconduct of corrupt officials. But see *Schumm v. Seymour*, 24 N. J. Eq. 143, 154. This objection failing where it is sought to hold the outsider, it would seem that the estoppel should exist in the circumstances of the principal case. See *New York v. Sonneborn*, 113 N. Y. 423, 426, 21 N. E. 121; *Buffalo v. Balcom*, 134 N. Y. 532, 536, 32 N. E. 7, 8.

NEGLIGENCE — DUTY OF CARE — BUSINESS CUSTOM AS A TEST OF DUE CARE. — The plaintiff, an employee of the defendant, was injured while working on one of the defendant's cars. The defendant requested a charge that it need exercise only the usual care of those engaged in the same business. *Held*, that the refusal so to charge was error. *Canadian Northern Ry. Co. v. Senske*, 201 Fed. 637 (C. C. A., Eighth Circ.).

In this doctrine the court has followed the language used in several other decisions in the federal courts. See *Shankweiler v. Baltimore & Ohio R. Co.*, 148 Fed. 195, 197; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 12 Sup. Ct. 679, 682. But the decisions scarcely bear out the conclusion that this is the sole test for the jury. But see *Chicago Great Western Ry. Co. v. Minneapolis, etc. Ry. Co.*, 176 Fed. 237, 242. The care others exercise should at most be only evidence of the care that a reasonably prudent man would exercise under the circumstances. See 14 HARV. L. REV. 156.

NUISANCE — RECOVERY OF DAMAGES — RECOVERY OF DAMAGES BY ONE HAVING NO RIGHT IN THE PROPERTY AFFECTED. — The defendant constructed and maintained a pond which emitted noxious air, causing the death of the plaintiff's intestate, while the latter was rightfully living in the house of his father. *Held*, that the defendant is liable for causing the death of the plaintiff's intestate by maintaining a nuisance. *Hosmer v. Republic Iron & Steel Co.*, 60 So. 801 (Ala.).

The early law imposed absolute liability for injury caused, without regard to the fault of the actor. As to damage done to realty this conception has, to a large extent, persisted. See article by Professor BOHLEN, 59 U. OF PA. L. REV. 298, 309, 310. Private nuisance partook of this nature, since it consisted of an injury to land or to the enjoyment or dominion of the possessor. See 3 BL. COMM., 216; COPELEY, TORTS, 3 ed., 1174. Consequently the fault of the person responsible for the nuisance was regarded as immaterial. See 59 U. OF PA. L. REV. 313, 314. It has long been recognized, however, that there is no liability for injuries purely personal, except in so far as there is fault on the part of the actor. See HOLMES, COMMON LAW, 88-90. In allowing an action on the case for nuisance by one who has no legal estate or possessory interest in land the court is historically wrong. Moreover, it is running counter to modern ideas of justice which discountenance tort liability without culpability unless there are special demands of social expediency. Here, on the contrary, there is the practical objection, which has had weight in the law, that the defendant is thereby subjected to a multiplicity of actions. See *Proprietors of Quincy Canal v. Neucomb*, 7 Met. (Mass.) 276, 283. The weight of authority is against the principal case. *McCalla v. Louisville & Nashville R. Co.*, 163 Ala. 107, 50 So. 971; *Ellis v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 131; *Hughes v. Auburn*, 161 N. Y. 96, 55 N. E. 389; *Holly v. Boston Gas Light Co.*, 8 Gray (Mass.) 123. (Specifically placed on the ground that there was no negligence.) Cf.

Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235. *Contra*, *Fort Worth & Rio Grande Ry. Co. v. Glenn*, 97 Tex. 586, 80 S. W. 992. See *Towaliga Falls Power Co. v. Sims*, 6 Ga. App. 749, 752, 753, 65 S. E. 844, 846. If the plaintiff's injury were occasioned by an act of the defendant and the defendant could have foreseen the injurious quality of the act, there should be a recovery on the ordinary principles of negligence. *Hunt v. Lowell Gas Light Co.*, 8 Allen (Mass.) 169. The plaintiff's protection would be complete if there is imposed on the defendant an affirmative duty to take reasonable measures to maintain his premises in a condition which would not cause injury to outsiders.

PUBLIC-SERVICE COMPANIES — REGULATION OF PUBLIC-SERVICE COMPANIES — CONTRACT FOR DIVISION OF TERRITORY: WHETHER AN ILLEGAL RESTRAINT OF COMPETITION. — A state public-utilities law empowered a commission to prevent exorbitant charges. A statute prohibited agreements to restrain competition in the supply of any commodity of general use. The plaintiff and the defendant, two competing telephone companies, entered into a contract to divide the territory. *Held*, that the contract is specifically enforceable. *McKinley Tel. Co. v. Cumberland Tel. Co.*, 140 N. W. 38 (Wis.).

Apart from statutes such contracts between public-service companies are generally held void, as being in restraint of trade. *South Chicago City Ry. Co. v. Calumet Electric St. Ry. Co.*, 171 Ill. 391, 49 N. E. 576; *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N. E. 169. But *cf. Ives v. Smith*, 3 N. Y. Supp. 645, 654. Pooling agreements are equally objectionable. *Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 61 Fed. 993; *Texas & P. Ry. Co. v. Southern Pacific Ry. Co.*, 41 La. Ann. 970, 6 So. 888. But *cf. Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. 383. It is undoubtedly the theory of the common law that competition is essential to trade. See *Hooker v. Vandewater*, 4 Den. (N. Y.) 349, 353. But see *Kellogg v. Larkin*, 3 Chand. (Wis.) 133, 159. In private business this theory is still unquestioned by the courts, but experience has not vindicated the wisdom of its full application to public callings. The field in any given case must necessarily be very limited, and fierce competition between a few great public-service corporations may often result disastrously for the public. See *Averill v. Southern Ry. Co.*, 75 Fed. 736, 738; *Hare v. London & N. W. Ry. Co.*, 2 Johns. & H. 80, 103. At least in the case of telephone companies, a regulated monopoly furnishes better service. When a legal restraint was placed on all monopolies by the common law, the uncertain condition of public-service law caused the courts to overlook the fact that in the case of public-service companies, the absolute prohibition of unreasonable rates could have furnished a sure means of preventing the dangers of monopoly. See 2 MORAWETZ, PRIVATE CORPORATIONS, 2 ed., § 1131. When modern legislation has made this means of regulation effective by providing for public-utilities commissions, it seems reasonable for the courts to make an exception to the common-law rule in the case of public-service companies. *Weld v. Gas & Electric Light Commissioners*, 197 Mass. 556, 84 N. E. 101.

PUBLIC-SERVICE COMPANIES — WHAT CALLINGS ARE PUBLIC — CEMETERIES. — The respondent corporation maintained a cemetery, for several years serving the general public, both whites and negroes, without discrimination. Thereafter a rule was made that no further lots should be sold to negroes. A negro petitioned for a writ of mandamus to compel the cemetery company to accept the body of his negro wife for burial. *Held*, that the petition was properly dismissed. *People ex rel. Gaskill v. Forest Home Cemetery Co.*, 101 N. E. 219 (Ill.).

The principal case raises the question whether the cemetery is a public-service company under duty to serve all the public without discrimination.

Although most cemeteries are private or charitable in nature, nevertheless where there is a clear public profession and where the undertaking is on a strictly business basis the calling is no doubt a public one. See *Evergreen Cemetery Association v. Beecher*, 53 Conn. 551, 553, 5 Atl. 353. Thus such corporations have by statute been given the right to acquire property by eminent domain. See *Wolford v. Crystal Lake Cemetery Association*, 54 Minn. 440, 445, 56 N. W. 56; *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 214, 29 N. E. 685. Unless the corporation in the principal case is private or charitable, which does not appear clearly from the facts, the case would seem a proper one for issuing a writ of mandamus.

RAILROADS — LIABILITY FOR FIRES — VALIDITY OF STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE. — Buildings of an ice company were destroyed by fire through the negligence of a railroad in operating a siding. The siding was on the railroad's right of way and in its control although constructed originally to accommodate the ice company. In an action for damages, the railroad claimed exemption from liability by virtue of a special contract. *Held*, that the contract is against public policy. *Stoneboro & Chautauqua Lake Ice Co. v. Lake Shore & Michigan Southern Ry. Co.*, 86 Atl. 87 (Pa.). See NOTES, p. 742.

RECORDING AND REGISTRY LAWS — EFFECT OF RECORDING: IN GENERAL — ADVERSE POSSESSION UNDER UNRECORDED DEED. — A. who had long been in adverse possession of certain land, obtained, before the statute of limitations had completely run in his favor, a deed to the premises from the owner, B., which he never recorded. A. continued to hold for the full period of the statute of limitations and soon after died. C., entering upon the land, obtained a second deed from B., recorded it and sold the land to a purchaser for value without notice. A.'s heirs now claim the property. *Held*, that they are entitled as against the *bonâ fide* purchaser. *Winters v. Powell*, 61 So. 96 (Ala.).

As a general rule recording acts do not protect the purchaser of a good record title against one who has acquired a title through adverse possession, whether the adverse possessor was occupying at the time of the purchase or not. *Hughes v. Graves*, 39 Vt. 359; *Schall v. Williams Valley R. Co.*, 35 Pa. St. 191. The majority of the court in the principal case decided that one can hold adversely although holding under an unrecorded deed. Although no cases exactly in point have been found, this would seem to be contrary to the general effect of recording statutes as construed by the courts, the purpose of recording statutes being only to give notice. As between the original parties and as against any person not expressly protected by the words of the statute, it seems settled that an unrecorded deed is an effective conveyance, recording not being necessary as a part of its execution. *Sidle v. Maxwell*, 4 Oh. St. 236; *Aubuckon v. Bender*, 44 Mo. 560. The Alabama courts have themselves adopted this view. See *Wood v. Lake*, 62 Ala. 489, 492. After the delivery of the unrecorded deed therefore, the grantee's possession could not be adverse, and rights under the unrecorded deed should be inferior to those of the *bonâ fide* purchaser of the record title.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST ACT — MONOPOLY A CONTINUING OFFENSE. — The defendants were indicted for a monopoly in violation of the Sherman Act. The unfair acts on which the monopoly was built up were committed more than three years prior to the indictment. *Held*, that the three-year statute of limitations is not a bar. *United States v. Patterson*, 201 Fed. 697 (Dist. Ct., S. D. Ohio).

In the Standard Oil case, unfair acts committed prior to the passage of the Sherman Act were used to throw light on the intent with which the combination

was effected after the act. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502. But the principal case goes farther, for nothing but the continuing of a monopoly already acquired is alleged within the statutory period. It has several times been held that conspiracy to restrain trade is a continuing offense under the act. *United States v. Kissell*, 218 U. S. 601, 31 Sup. Ct. 124; *United States v. Swift*, 186 Fed. 1002. See 24 HARV. L. REV. 505. Likewise contracts in restraint of trade are not saved by virtue of having been entered into before the act was passed. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540. It is true that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450. But the Sherman Act condemns "monopolizing," and seems therefore to make illegal the mere continuance of a monopoly illegally acquired. The act was aimed not more at the unfair acts in themselves than at the condition of stifled competition in which they result. The view of the principal case finds support in the language of several cases. See *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 830; *Standard Oil Co. v. United States*, *supra*, 58-62, 77.

SPECIFIC PERFORMANCE — OPTION TO PURCHASE — ENFORCEMENT AGAINST AN INTERVENING PURCHASER WITH NOTICE. — A vendor of land in consideration of one dollar gave the plaintiff an option to purchase the land for a specified price at any time during the next thirty days. During this period the defendant purchased the land with notice of this option. The plaintiff exercised his option in due time and brought a bill for specific performance against the defendant and the vendor. The defendant demurred. *Held*, that the demurrer should be overruled. *Horgan v. Russell*, 140 N. W. 99 (N. D.). See NOTES, p. 747.

SURETYSHIP — SURETY'S DEFENSES: OMISSIONS OF CREDITOR — BANK'S FAILURE TO APPLY DEPOSIT OF DEBTOR ON ITS CLAIM AGAINST HIM. — The maker of a note after its maturity had general deposits with the bank holding the note sufficient to cover the debt, but afterwards withdrew them. *Held*, the surety is not released. *National Bank of Commerce v. Gilvin*, 152 S. W. 652 (Tex., Ct. Civ. App.).

The bank had the undoubted right to apply the deposit to discharge the debt. *Bank v. Brewing Co.*, 50 Oh. St. 151; *Clark v. Northampton Bank*, 160 Mass. 26, 35 N. E. 108. Any release by the creditor of securities though acquired subsequent to the debt releases the surety to the value of the security. *Baker v. Briggs*, 8 Pick. (Mass.) 122; *Rogers v. School Trustees*, 46 Ill. 428. If this is solely because the surety loses his right of subrogation against the security, it has no application in the principal case where there is no security. *National Mahairwe Bank v. Peck*, 127 Mass. 208. For the bank has no lien on the deposits. Thus it cannot hold the deposit if the note is not due. *Merchants' National Bank v. Robinson*, 97 Ky. 552; *Columbia National Bank v. German National Bank*, 56 Neb. 803, 77 N. W. 346. If there were a lien, though the deposits were insufficient to cover the debt, their payment would discharge the surety *pro tanto*. *Wharton v. Duncan*, 83 Pa. St. 40; *Cummings v. Little*, 45 Me. 183. But such is not the law. *People's Bank v. Legrand*, 103 Pa. St. 309; *Bacon's Administrators v. Bacon's Trustees*, 94 Va. 686, 27 S. E. 576. But the creditor's duty to the surety is more than mere refraining from interference with his right to subrogation. Thus he must register documents if necessary to protect the security. *State Bank v. Bartle*, 114 Mo. 276, 21 S. W. 816. He must notify the surety in certain cases. 1 BRANDT, SURETYSHIP, 3 ed., c. viii. He must accept a tender by the debtor. *Curia v. Packard*, 29 Cal. 194; *Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105. But he owes no duty to accept burdensome security. *Fuller v. Tomlinson Brothers*, 58 Ia. 111,

12 N. W. 127. Nor to prosecute his claim against the estate of a deceased debtor within the short period allowed. *Sibley v. McAllaster*, 8 N. H. 389; *Villars v. Palmer*, 67 Ill. 204. *Contra*, *Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833. Nor to prevent a judgment lien from expiring. *Kindt's Appeal*, 102 Pa. St. 441. Nor to prove against the estate in bankruptcy or insolvency. *Clopton v. Spratt*, 52 Miss. 251; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591. See 20 HARV. L. REV. 502. Nor to sue the debtor though requested by the surety. *Hickok v. Farmers' & Mechanics' Bank*, 35 Vt. 476; *Harris v. Newell*, 42 Wis. 687. *Contra*, *Pain v. Packard*, 13 Johns. (N. Y.) 174. An affirmative duty, then, is imposed when slight action by the creditor will greatly benefit the surety. In the principal case, only a transfer in the bank's books is required, and it seems that the duty should be imposed. *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 30 S. W. 203; *Commercial National Bank v. Henninger*, 105 Pa. St. 496. The weight of authority, however, holds the opposite result necessary to preserve the fluidity of bank deposits by protecting the bank in paying any check covered by a deposit. *Davenport v. State Banking Co.*, 127 Mass. 298. *National Mahaiwe Bank v. Peck*, 126 Ga. 136, 54 S. E. 977. There seems no reason for distinguishing between deposits at and those after the debt's maturity, but this has been done in one state. *People's Bank v. Legrand*, *supra*; *Commercial National Bank v. Henninger*, 105 Pa. St. 496.

TORTS — INTERFERENCE WITH BUSINESS — EFFECT OF WRONGFUL MOTIVE IN SALE OF LAND. — A landowner erected a large sign on her land bearing the words, "For Sale. Best Offer from Colored Family." An advertisement similarly worded was published in a daily newspaper. Although intending to sell, the defendant was actuated by ill-will toward the plaintiffs, and by the threatened sale was seriously interfering with their real-estate business. The plaintiffs filed a bill in equity to enjoin the defendant from continuing the advertisement and the sign. *Held*, that no injunction should be granted. *Holbrook v. Morrison*, 100 N. E. 1111 (Mass.). See NOTES, p. 740.

TROVER AND CONVERSION — DAMAGES — RIGHT TO RETURN CONVERTED PROPERTY IN MITIGATION OF DAMAGES. — The defendant in recovering two rafts that had gone adrift, by mistake took a raft belonging to the plaintiff. Upon being notified, the defendant left the raft at the plaintiff's landing. The plaintiff sued for conversion. *Held*, that he may recover the full value of the raft. *MacKenzie v. The Scotia Lumber Co.*, 12 East. L. R. 120 (Nova Scotia).

In general, an action of trover may lie, even though the defendant acted under a mistake or intended to benefit the owner. *Hollins v. Fowler*, L. R. 7 H. L. 757; *Hiort v. Bott*, L. R. 9 Ex. 86. The damages are ordinarily the full value of the chattel. This rule, though somewhat harsh, seems justified by the greater security afforded personal property by relieving the owner of the hardship of receiving a partially spoiled chattel, with purely conjectural damages. By the weight of authority in the United States, the measure of damages is the same even where, as in the principal case, the defendant is able and willing to put the plaintiff *in statu quo*. *Carpenter v. Manhattan Life Ins. Co.*, 22 Hun (N. Y.) 47; *Carpenter v. Dresser*, 72 Me. 377. Where the plaintiff has suffered nothing by the conversion, it is hard to see what useful purpose is served by allowing him to force a sale on the defendant. Property rights are not thereby made more secure and nominal damages would serve to adjudicate the plaintiff's right. See *Sulton v. Great Northern R. Co.*, 99 Minn. 376, 378, 109 N. W. 815, 816. The courts should have power to order such a plaintiff to mitigate damages. *Hiort v. London & Northwestern R. Co.*, L. R. 4 Ex. D. 188; *Rulland & Washington R. Co. v. Bank of Middlebury*, 32 Vt. 639; *Bigelow Co. v. Heintze*, 53 N. J. L. 69, 21 Atl. 109; *Warder v. Baldwin*, 51 Wis. 450, 8 N. W. 257.

BOOK REVIEWS.

LECTURES ON LEGAL HISTORY AND MISCELLANEOUS ESSAYS. By James Barr Ames. With a Memoir. Cambridge: Harvard University Press. 1913. pp. viii, 553.

The essays contained in this volume represent all the important writings of Professor Ames, with the exception of two articles on the Negotiable Instruments Law which have been separately published; and with the further exception, of course, of the great mass of valuable annotations scattered through his case-books.

As one of Mr. Ames's friends has written, his work as an essayist was "only the by-product of his real work, chips from his workshop;" and great as was the labor which went into the lectures and essays in this volume, the statement is doubtless true. Learning and teaching were pursuits more vital and necessary to Mr. Ames than authorship, and the form of authorship to which he gave more time than to any other was that of annotating his numerous case-books. Yet the value of these essays is very great. About one-half of the volume is devoted to lectures on legal history. These were originally delivered about twenty-five years ago. Many of them were subsequently elaborated and published in the *HARVARD LAW REVIEW*, and several were reprinted in the "Select Essays on Anglo-American Legal History." But about one-third of the matter in the lectures has never before been printed, and even if all had previously appeared in magazines the lectures well deserve publication in a single volume. They give the best outline yet made of the common law and equity of England, aside from the law of crimes and of real property, in the important and interesting centuries when the foundations of modern English legal doctrine were welded into a connected and coherent whole.

Most writers on the law of remote periods fall into one of two faults: either they become mere chroniclers of rules and decisions which for lack of adequate understanding or explanation seem barbarous and illogical, or they substitute imagination for fact and write of what may have been supposed to exist, rather than of what actually did exist. Nobody could have made a more thorough study of his sources than Mr. Ames, nor have used them more effectively; and yet, while giving the actual decisions on which his conclusions are based, he is able from the scattered fragments which these decisions furnish to reconstruct the theories and rules behind them, and show their relations to modern law. Much that is in these lectures is both an original and a final statement.

The remainder of the essays composing the volume have all been published previously, and it is a work of supererogation to attempt to characterize them. They are already known wherever the English common law is studied. They show to those who never knew Mr. Ames his fertility in legal theory, as well as his learning and industry in supporting his theories with analogies from all branches of the law, and with decisions from the earliest to the latest times.

The Memoir, which precedes the Essays, is skillfully put together from a number of tributes which appeared shortly after Mr. Ames's death. It gives a statement of the facts of his life, and also gives some indication of the impression he made upon those around him.

Great labor has evidently gone into the editing of the volume. The preparation of the text of the lectures, involving, as it did, a collation of numerous sets of manuscript notes, must have taken an enormous deal of time. The result achieved is excellent, for those of the lectures hitherto unpublished do not

read like mere notes, but like completed essays. The tables of sources consulted, of cases, and of other authorities cited, and the index, are all full and excellent.

A debt of gratitude to the editor, who, though his name does not appear in the volume, is well known to be Professor Beale, should not be left unmentioned. His work has been done with scrupulous care and fidelity. s. w.

A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS, AND MOVEMENTS IN
CONTINENTAL LEGAL HISTORY. By Various European Authors. Boston:
Little, Brown, and Company. 1912. pp. liii, 754.

This volume, the first of the "Continental Legal History Series" published under the auspices of the Association of American Law Schools, seeks to render available for the English reader the results of half a century of critical study of the history of European law. Nothing of the sort has before been attempted within the limits of a single book or even a single series, and this volume "has therefore been constructed by fitting together chapters separately written, each by a specialist in his own field," in the effort "to weave them into a connected and inclusive story, giving to each country the proper proportions, tracing in each the principal elements of legal life common to all, and exhibiting their variances from the highway of development." Certain of the chapters have been specially written for the purpose by eminent scholars, others have been condensed and adapted from recent standard treatises. The introductory account of the period before 1000 and the succeeding chapter on Italy, taken from the *Storia di diritto italiano* of Calisse and revised by the author in Professor Wigmore's translation, are particularly successful. The treatment is scholarly, the proportion is good, and, if any one book is to determine the direction of approach to the general subject, it was probably wise to choose an Italian treatise. The portion devoted to France, chiefly from Brissaud, is much less satisfactory; there are too many names and titles for the present purpose, and the material needs bringing up to date. The same holds true of the all too brief pages on canon law taken from Brissaud, and the Scandinavian chapter is likewise too bibliographical in character. The German portion uses excellent material, — Brunner, Stintzing, Stobbe, Schröder, Siegel, Zoepfl, — but the result is necessarily uneven and often scrappy. The translation here is apt to be clumsy and is sometimes misleading, as in dragging in hundreds, shires, and earldoms on p. 314, or rendering *geistliche Stifter*, as "chapter-houses" (p. 325). The Netherlands, Switzerland, and Spain have the advantage of excellent accounts specially prepared for the purpose by van Hamel, Huber, and Altamira respectively. The Spanish chapters are relatively full and will prove of special interest to the American reader. The plan of the work does not include eastern Europe nor, what is a more serious omission, European colonies. Any full treatment of colonial law would, of course, have been out of the question, but a large part of the significance of certain legal systems lies in the extent of their influence, and the reader would at least like to know something of the spread of the law of France and Spain to the New World. The necessary space could have been advantageously taken from the bibliographies, long and not always discriminating lists of titles which can be of no use to those ignorant of foreign languages and which are quite as accessible to scholars in the original manuals. Criticisms of this sort should not, however, be taken as disparaging the usefulness of the work and the serious and careful labor which it has involved. Those who still doubt the utility of such knowledge of continental law as this series seeks to impart should read the introduction by Justice Holmes and the preface of Professor Wigmore, the chairman of the editorial committee. The project shows generous recognition of the fruit-

fulness of the historical and comparative study of European law; its results ought to be gratefully received by students of history as well as by the members of the profession, for which it is particularly designed. C. H. H.

THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW. By Amos G. Hershey. New York: The Macmillan Company. 1912. pp. xlviii, 558.

There was a place for this book; and the place is now filled creditably. The plan is to give a rapid survey of the whole subject, with such bibliographical material as will enable the reader to go into any special topic as deeply as he may wish. The book assigns proper proportions to the respective subjects. History is not over-emphasized. Nor is ethics. The attempt has been to present International Law as it is. The citation of judicial decisions does not go far beyond the material in Scott's Cases on International Law; and this sort of restriction is part of the wise modesty appropriate to a book professing to be an elementary introduction. The various Conventions and Declarations of Hague Conferences, and of similar bodies, appear not in an appendix but in the text, the pertinent provisions being presented at the places where they explain the respective topics. Perhaps it might have been well to indicate more clearly that many of these provisions have not yet received formal approval from the countries in interest; but for practical purposes it must be admitted that in such Conventions and Declarations, even though not yet ratified, the student almost always finds useful statements of that which is believed by good authorities to be sound.

As the scope of the book includes the whole of International Law, and not simply that part which is administered in courts, this is not in the strict sense a law book, or even a book prepared with special reference to the needs of law students. Yet the extra-legal matter, even though it be, as it seems to be, vastly the greater part of the text, does not render this book unacceptable to those who seek law only; for the book is so small that the extra-legal matter seems to be no more than even the most narrow-minded of lawyers might well accept as a necessary atmosphere explanatory of the law which has grown up within mere ethics and etiquette and diplomacy. Nor will the legal reader be repelled or injured by the non-legal tone in which the author deals with such of the points as can be said to be in the full sense law. In truth the person seeking for strict law is expected to use this book as a guide to other books. For this purpose the citations — numbering thousands — are of great value. Prefixed to the volume is a list of authorities covering twenty-eight pages. Bibliographies are appended to thirty-four of the thirty-five chapters. On almost every page are foot-notes giving references. Thus the book deserves a place in that small group to which any one interested in bibliographical material is much indebted — the group which includes Scott's Cases on International Law, Bonfils' Droit International Public, and Oppenheim's International Law.

IMMIGRATION AND LABOR. THE ECONOMIC ASPECTS OF EUROPEAN IMMIGRATION INTO THE UNITED STATES. By Isaac A. Hourwich. New York: G. P. Putnam's Sons. 1912. pp. xvii, 544.

Recent studies of immigration into the United States, and especially the reports of the Immigration Commission, have dwelt much on the economic consequences of immigration, and have advocated restriction of immigration. Dr. Hourwich's book is an argument against restriction, turning upon the thesis that immigration does not affect rates of wages and exists because demanded by

our industries. The author's method is to compare wages at different times and places and, finding no clear evidence of lowered wages where immigrants go, to infer that immigration does not tend to lower wages.

Apart from the fact that few American wage statistics are good enough for exact argument, a fundamental objection may be made to such an empirical study of wages as is here offered. Wages, like other prices, result from the play of various forces; they may be stationary or even rise while one force making for reduction is increasing. Such a force, on clear grounds of theory, is immigration. No scrutiny of pay-rolls can show that wages in an occupation would not have been higher had fewer men competed for jobs.

Powerful forces in our civilization are making for the increase of incomes. On social grounds such increase is peculiarly desirable in the stratum of occupations entered by immigrants, but is hindered by unrestricted immigration. A sparsely settled county needs immigrants in a very real sense; can there be the same absolute need in the present and future United States? R. F. F.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS.

By Thomas Gold Frost. Fourth Edition. Boston: Little, Brown, and Company. 1913. pp. xv. 884.

This book consists of three parts. The first part consists of a statement of a number of points on which persons intending to form a corporation would like to be informed, and a compressed statement as to what the author considers is the law or the tendency of the law. It has a value in presenting points which ought to be carefully considered, but the author, in his limited space, is unable adequately to consider them. The subject of *ultra vires* transactions is, for example, given four pages. This part of the book is chatty, but not authoritative. The second part is a synopsis-digest of the incorporation acts of the several states and territories of the United States, and the third part is a collection of forms and precedents. The book is primarily a manual, and not a treatise, but is valuable as a manual. E. H. W.

THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES. By Max Farrand. New Haven: Yale University Press. 1913. pp. ix, 281.

HANDBOOK OF ENGLISH LAW REPORTS. By J. C. Fox. Part I. London: Butterworth and Company. 1913. pp. viii, 107.

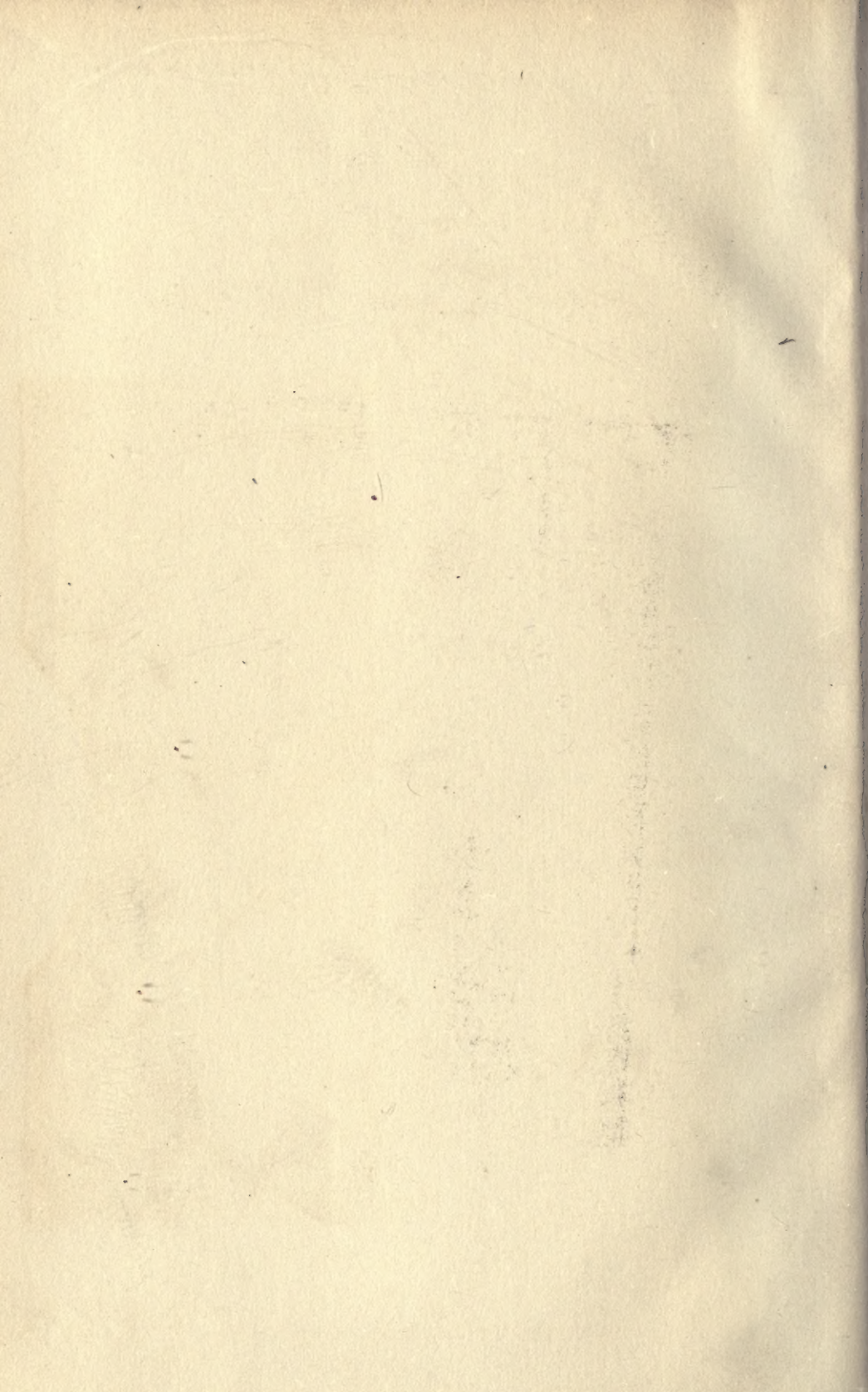
SUMMARIES OF LAWS RELATING TO THE COMMITMENT AND CARE OF THE INSANE IN THE UNITED STATES. By John Koren. New York: National Committee for Mental Hygiene. 1912. pp. x, 297.

THE PANAMA CANAL CONFLICT BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA. By L. Oppenheim. Second Edition. Cambridge, England: University Press. 1913. pp. vi, 57.

ESSAYS IN TAXATION. By Edwin R. A. Seligman. Eighth Edition. London: Macmillan and Company, Ltd. 1913. pp. xi, 707.

THE LAW OF ARBITRATION AND AWARDS. By Joshua Slater. Fifth Edition. Revised, Rewritten, and Enlarged by Albert Crew. London: Stevens and Haynes. 1913. pp. xxii, 232.

PRINCIPLES OF MUHAMMADAN LAW. By Faiz Badruddin Tyabji. Bombay: D. B. Taraporevala Sons. 1913. pp. xxxvii, 711.



K

Harvard law review

ALH3395

v.26

PLEASE DO NOT REMOVE
CARDS OR SLIPS FROM THIS POCKET

UNIVERSITY OF TORONTO LIBRARY

